Supreme Court, U. S.
FILED
NOV 22 1974
MICHAEL RODAK, JR., CLERK

No. 74-635

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
ROBERT B. REICH,
Assistant to the Solicitor General,
PETER M. SHANNON, JR.,
LAUREN S. KAHN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provision and statute involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	14
Appendix A	1a
Appendix B	6a

CITATIONS

Cases:

Blair v. *United States*, 250 U.S. 273	11
Brown v. *United States*, 245 F. 2d 549	13
Bryson v. *United States*, 396 U.S. 64	11, 12
Cargill v. *United States*, 381 F. 2d 849, certiorari denied, 389 U.S. 1041	11–12
Commonwealth of Pennsylvania v. *Columbia Investment Corp., et al.*, No. 162, decided September 5, 1974 (Sup. Ct., Pa.)	7
Counselman v. *Hitchcock*, 142 U.S. 547	8
Glickstein v. *United States*, 222 U.S. 139	11
Harris v. *New York*, 401 U.S. 222	11, 12
Miranda v. *Arizona*, 384 U.S. 436	7, 8, 9, 12
Robinson v. *United States*, 401 F. 2d 248	7
Schneckloth v. *Bustamonte*, 412 U.S. 218	8, 13
Sherman v. *United States*, 356 U.S. 369	13
Sorrells v. *United States*, 287 U.S. 435	13
Stanley v. *United States*, 245 F. 2d 427	8
United States v. *Andrews*, 370 F. Supp. 365	12
United States v. *Calandra*, 414 U.S. 338	6, 14

563-703—74——1

Cases—Continued

	Page
United States v. *Corallo*, 413 F. 2d 1306 certiorari denied, 350 U.S. 897	7
United States v. *Cross*, 170 F. Supp. 303	13
United States v. *DiGiovanni*, 397 F. 2d 409, certiorari denied, 393 U.S. 924	11
United States v. *Dionisio*, 410 U.S. 1	9
United States v. *DiMichele*, 375 F. 2d 959, certiorari denied, 389 U.S. 838	7
United States v. *Fruchtman*, 282 F. Supp. 534	13
United States v. *Icardi*, 140 F. Supp. 383	13
United States v. *Knox*, 396 U.S. 77	11, 12
United States v. *Luxenberg*, 374 F. 2d 241	8
United States v. *Mandujano*, 496 F.2d 1050	5, 7, 12
United States v. *Monia*, 317 U.S. 424	7, 8
United States v. *Nickels*, No. 74–1153, decided September 12, 1974 (C.A. 7)	11
United States v. *Parker*, 244 F.2d 943	11
United States v. *Pommerening*, 500 F.2d 92	12
United States v. *Rangel*, 496 F.2d 1059	5, 7
United States v. *Russell*, 411 U.S. 423	13
United States v. *Scully*, 225 F.2d 113, certiorari denied, 350 U.S. 897	7
United States v. *Thayer*, 214 F. Supp. 929	13
United States v. *Washington*, No. 7609, decided November 6, 1974 (D.C. Ct. App.)	8
United States v. *Winter*, 348 F.2d 204, certiorari denied, 382 U.S. 955	11
Constitution and statutes:	
United States Constitution:	
Fourth Amendment	13
Fifth Amendment	2, 4, 5, 6, 7, 8, 9
18 U.S.C. 1511	2
18 U.S.C. 1623	2, 4
18 U.S.C. 1955	2

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, p. 1a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 6a) was entered on September 23, 1974. On October 23, 1974, Mr. Justice Douglas extended the time to petition for a writ of certiorari to and including November 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a "putative defendant" called as a grand jury witness is entitled to be warned prior to testifying of her "right to remain silent."

2. Whether the government's failure to give an adequate warning to a prospective defendant should result in the suppression of her testimony in a subsequent prosecution for perjury.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. 18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 7, 1973, respondent testified before a grand jury for the Northern District of California. Her testimony was part of an investigation to discover violations of 18 U.S.C. 1955 (illegal gambling businesses) and 18 U.S.C. 1511 (obstruction of state and local law enforcement). Prior to testifying, respondent was warned by the prosecutor (R. 51–54):[1]

[1] "R." designates the record on appeal in the Ninth Circuit. "Tr." designates the transcript of the hearings on respondent's motion to suppress her grand jury testimony.

> You * * * need not answer any question which you feel may incriminate you. * * * [Y]ou [have] the right to refuse to answer any question which you feel might incriminate you. * * * [I]f you do give an answer, that answer may be used against you in a subsequent criminal prosecution, if in fact the Government should decide to prosecute you for any crime. * * * You also have the right to consult with an attorney prior to answering any question here today. * * * [I]f you cannot afford an attorney, * * * we would see that an attorney is afforded [sic] to represent you. * * * [I]f you do answer any questions and should you knowingly give any false testimony, or false answers to any questions, you would be subject to prosecution for the crime of perjury under the Federal Laws.

Respondent indicated that she understood each of these warnings. The prosecutor then carefully explained to her the meaning of perjury (R. 53–54):

> Q. * * * [I]n essence, perjury means telling a lie under oath. Do you understand what that is?
>
> A. Yes.
>
> Q. Do you understand the difference between lying and telling the truth?
>
> A. Yes.
>
> Q. Under oath?
>
> A. Uh huh.
>
> * * * * *
>
> Q. With respect to perjury, as we have discussed it, let me advise you that the Federal crime of perjury, before a Grand Jury, carries a penalty of five years imprisonment. That is a maximum penalty and/or $10,000 fine.

Following these warnings, respondent was asked if she had ever given money or gifts to any police officers and if she had ever met with police officers to discuss gambling. She denied that she had engaged in any such activities. (R. 63–64). At the time she was asked these questions, the govenment had evidence that she had paid bribes to certain police officers, who had turned the money over to the Federal Bureau of Investigation. The questioning was designed to elicit names of any officers who had not cooperated with the government, and who would therefore be indictable (Tr. 97).

On November 29, 1973, respondent was indicted for perjury, in violation of 18 U.S.C. 1623, on the basis of her September 7, 1973, denials to the grand jury that she had ever given money or gifts to any police officers or discussed gambling with them (R. 63–64). On January 22, 1974, respondent filed a motion to dismiss the indictment, in which she alleged, *inter alia,* that the indictment was invalid because the testimony on which it was based was obtained without her having been effectively advised of her Fifth Amendment rights. On February 8, 1974, following an evidentiary hearing on her motion, the district court ruled that, although she had been given "a full, complete and adequate warning" of her privilege against self-incrimination prior to testifying, her grand jury testimony must be suppressed because her lack of proficiency in the English language prevented her from understanding the warning (Tr. 110). This ruling was issued from the bench, and the court made no written findings of fact. It stated, however, that

respondent had understood what perjury meant (Tr. 110) and had clearly understood the substantive questions asked of her (Tr. 98–99).[2]

The court of appeals affirmed, reasoning that "[t]he perjurious answers were induced by an unfair procedure violative of the [Due Process Clause of the Fifth Amendment]" (App. A, *infra,* p. 2a). The unfairness stemmed, according to the court, from the government's failure effectively to warn a witness whom the government knew to be a prospective defendant of her "right to remain silent," thereby creating a "substantial danger" that she would feel compelled to choose between self-incrimination and perjury. The court acknowledged that the government had provided respondent with all the warning to which she was entitled and stressed that it had found no "bad faith" on the part of the government. "Nevertheless, the government having employed a procedure calculated to exploit her lack of understanding, it runs the risk of a subsequent determination that its curative procedures were inadequate and the due process violation undissipated" (App. A, *infra,* p. 5a, n. 4). The court agreed with the ruling of the district court that respondent's testimony was therefore inadmissible in a subsequent perjury prosecution.[3]

---

[2] The district court made no ruling on respondent's motion to dismiss the indictment.

[3] The court relied upon *United States* v. *Mandujano*, 496 F. 2d 1050 (C.A. 5), and its companion case, *United States* v. *Rangel*, 496 F. 2d 1059 (C.A. 5). On October 16, 1974, the Fifth Circuit denied the government's motion for a rehearing *en banc* in those two cases. On November 12, 1974, Mr. Justice Powell extended the time for the United States to petition for a writ of certiorari in those cases to and including December 15, 1974.

REASONS FOR GRANTING THE WRIT

This case presents two important and related questions concerning procedures for questioning grand jury witnesses and remedies for the government's failure to follow any procedures that may be held to be required. The first question, over which the circuits are in conflict, is whether a grand jury witness suspected of participating in the substantive offense must, prior to testifying, be given an effective warning of her "right to remain silent." The second question, in connection with which it is assumed that some warning is constitutionally required, and over which the opinion of the court below is in conflict with decisions of several circuits and with decisions of this Court, is whether the government's failure to give an adequate warning should result in the suppression of a "putative defendant's" testimony in a subsequent prosecution for perjury.

In giving affirmative answers to these two questions, the court of appeals in the instant case needlessly impeded the investigative power of the grand jury, which "must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra*, 414 U.S. 338, 344. It also adopted an unduly expansive notion of the content of the due process and self-incrimination provisions of the Fifth Amendment, which do not require the giving of a warning appropriate to police interrogation in the grand jury context and do not in any event permit a witness who receives an inadequate warning to lie to the grand jury with impunity.

1. In holding that the Due Process Clause of the Fifth Amendment requires that a so-called "putative defendant" be given, prior to grand jury questioning, an effective warning of her "right to remain silent."[4] the court of appeals carved out an unwarranted exception to the well-established rule that grand jury witnesses need not be given *Miranda* warnings prior to testifying, even when their responses might tend to incriminate them.[5] The court relied upon the reasoning of the Fifth Circuit in the companion cases of *United States* v. *Manduj no, supra,* and *United States* v. *Rangel, supra,* both of which distinguished a "putative defendant" from an ordinary grand jury witness and held that the former is entitled to *Miranda*

[4] The court of appeals' allusion to a "right to remain silent," possibly based on analogy to *Miranda*, is an inaccurate statement of the Fifth Amendment privilege of a witness appearing before a grand jury, who has no "right to remain silent" *per se*, but only a right to claim his Fifth Amendment privilege with respect to responses which he has reasonable grounds for believing may tend to incriminate him. See *United States* v. *Monia*, 317 U.S. 424, 427. We assume, however, that the decision below did not turn upon any distinction between an absolute right of silence and the more limited privilege against self-incrimination granted by the Fifth Amendment, and that the court of appeals would have found no unfairness had it been established that respondent understood the Fifth Amendment privilege.

[5] See *e.g.*, *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Corallo*, 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *United States* v. *Di Michele*, 375 F. 2d 959 (C.A. 3), certiorari denied, 389 U.S. 838; *Robinson* v. *United States*, 401 F. 2d 248, 250 (C.A. 9). See also *Commonwealth of Pennsylvania* v. *Columbia Investment Corp., et al.*, No. 162, decided September 5, 1974 (Pa. Sup. Ct.).

563-703—74——2

warnings before testifying.[6] We submit that this distinction is warranted by neither precedent nor logic, and that no grand jury witness—including "one on whom the grand jury investigation has focused"—is entitled, prior to testifying, to a warning of a right to remain silent.

The Fifth Amendment speaks of compulsion. "It does not preclude a [grand jury] witness from testifying voluntarily in matters which may incriminate him." *United States* v. *Monia,* 317 U.S. 424, 427. Voluntariness is, of course, an elusive concept for which no single formula or factor, such as failure to advise of rights, is determinative. See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226, 234. A witness who testifies before a grand jury may invoke the Fifth Amendment privilege if the witness has reasonable grounds for believing that truthful responses will tend to be incriminating. *Counselman* v. *Hitchcock,* 142 U.S. 547. However, "he must claim [the privilege] or he will not be considered to have been 'compelled' within the meaning of the Amendment," *United States* v. *Monia, supra,* 317 U.S. at 427, even if the witness

[6] The Sixth Circuit has suggested that it would subscribe to the same distinction for purposes of requiring warnings. See *United States* v. *Luxenberg*, 374 F. 2d 241, 246 (C.A. 6); *Stanley* v. *United States*, 245 F. 2d 427, 434 (C.A. 6). In no case, however, has the Sixth Circuit intimated that any blanket "right to remain silent" should apply to a "putative defendant" before the grand jury. See n. 4, *supra.*

The District of Columbia Court of Appeals has recently held that a "putative defendant" must be given *Miranda* warnings before appearing in the grand jury room for questioning and must also be informed that he is considered to be a "putative defendant." *United States* v. *Washington*, No. 7609, decided November 6, 1974, slip op. at 1–4. (D.C. Ct. App.).

was not specifically informed of the right to invoke the privilege.[7]

We perceive no reason in logic or experience for assuming that respondent's answers before the grand jury were less *voluntary* because she was suspected of involvement in the criminal enterprise under investigation than would have been the responses of any other witness. A so-called "putative defendant" may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. The greater likelihood that one suspected of having taken part in the offenses that the grand jury is investigating will give responses that may be incriminating does not affect the voluntariness of the responses.

Nor is the position of a so-called "putative defendant" before the grand jury analogous to the situation of an accused during custodial police interrogation. The *Miranda* warnings were designed to assure that the right not to be subjected to *compelled* self-incrimination was protected in custodial settings, which are essentially solitary, and which the Court found to be inherently coercive and difficult to supervise by neutral authority. The critical concern of the Court was with the dangers inherent in "incommunicado" interrogation. *Miranda* v. *Arizona,* 384 U.S. 436, 445. The warnings were never intended to "create a constitutional straightjacket" (*id.* at 467) to be applied across-the-board to every form of official interrogation. They are inappropriate to a grand jury setting, where questioning takes place before 23 private citizens, under the supervision of a

[7] See cases cited at n. 5, *supra.*

presiding judge, and where, if the time scheduled for a witness's appearance is inconvenient, it can generally be altered. See *United States* v. *Dionisio,* 410 U.S. 1.

Nor, finally, can it be assumed that the government's primary motive in summoning a potential defendant before a grand jury is, as the court below suggested, to gain unfair advantage over the witness arising from "the wholly predictable fact that the witness will be ignorant of or not understand the right to remain silent, and be compelled by answering to subject himself to criminal liability" for the substantive offense or for perjury (App. A, *infra,* p. 5a). On the contrary, a witness who is suspected of having taken part in the substantive offenses into which the grand jury is inquiring is likely to represent one of the best sources of information critical to the grand jury's inquiry as to whether a crime has been committed and, if so, the identity of others who may be involved. In the instant case, for example, respondent could have been helpful to the grand jury in determining who, if anyone, was involved in illegal gambling and police bribery. Alternatively, such a witness may wish to confess his or her part in the offense (the Constitution reflects no policy against voluntary confessions), or may be able to exculpate himself or herself to the satisfaction of the grand jury. Contrary to the conclusion of the court of appeals, we fail to see what is unfair to the witness in governmental efforts to elicit relevant information in the possession of the witness by normal grand jury questioning, provided that there has been no improper compulsion of testimony.

The court of appeals' blanket requirement that every witness likely to be indicted by a grand jury be warned of the "right to remain slient" prior to testifying would tend to discourage the cooperation that is necessary for the grand jury to determine whether criminal proceedings should be instituted against any person. It could place an unwarranted stumbling block in the way of the grand jury's investigation, predicated upon difficult forecasts about who is apt to be indicted. As this Court stated in *Blair* v. *United States,* 250 U.S. 273, 282, "the scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."

2. In holding that testimony of a "putative defendant" given without prior effective warning of the right to remain silent is inadmissible in a subsequent prosecution for perjury, the court of appeals created an exception to the well-established rule that "the immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States,* 222 U.S. 139, 142; see also *Harris* v. *New York,* 401 U.S. 222, 225; *Bryson* v. *United States,* 396 U.S. 64; *United States* v. *Knox,* 396 U.S. 77. In so doing, the court also brought itself into sharp conflict with decisions of the Second, Seventh, and Tenth Circuits,[8] which have held that even if putative de-

[8] *United States* v. *Winter,* 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Parker,* 244 F. 2d 943 (C.A. 7); *United States* v. *DiGiovanni,* 397 F. 2d 409, 412 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Nickels,* No. 74–1153, decided September 12, 1974 (C.A. 7); *Cargill*

fendants are entitled to some *Miranda* warnings, failure to give the warnings does not license them to commit perjury.

If a witness is improperly compelled to incriminate himself, his incriminating statements may be excluded from use by the prosecution. But he may not avoid the compulsion by committing perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72. The court of appeals in the instant case, however, again relying upon the reasoning of the Fifth Circuit in *United States* v. *Mandujano, supra,* found this broad principle inapplicable to a "putative defendant" who lies to a grand jury, since "the government's use of such a procedure against a witness it knows to be virtually in the position of a defendant is unfair" (App. A, *infra,* p. 3a).

In *Mandujano,* which did not allude to the *Knox-Bryson-Harris* line of authority, the court's finding of "unfairness" was based upon an inference that the government's primary purpose for asking a "putative defendant" incriminating questions was to "entrap" him into committing perjury. As we have already indicated, however, the government has many legitimate purposes for asking a witness, suspected of taking part in the criminal activities, questions to which

v. *United States*, 381 F. 2d (C.A. 10), certiorari denied, 389 U.S. 1041; *United States* v. *Pommerening*, 500 F. 2d 92 (C.A. 10). See also *United States* v. *Andrews*, 370 F. Supp. 365, 371 (D. Conn.).

truthful responses may tend to be incriminating. See p. 10, *supra.*[9]

Moreover, a "putative defendant" who lies to a grand jury rather than incriminate himself cannot be considered to be "entrapped" into committing perjury, as the concept of entrapment has been articulated by this Court. The government does not implant the design to commit perjury in the mind of such a witness. See *United States* v. *Russell,* 411 U.S. 423, 436. Nor does the government thwart whatever predisposition to tell the truth the witness may have. See *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369.

Even if such questioning without adequate warning were "unfair,"[10] however, it does not follow that the resulting testimony should be inadmissible in a prosecution for perjury. The exclusionary rule is generally "restricted to those areas where its remedial objectives

[9] The government's questioning of a witness suspected of having taken part in a criminal offense is different from the abuse of process resulting from repeated summoning of a witness before a tribunal, or summoning a witness even once before a tribunal without jurisdiction to conduct the inquiry, where such action is apparently designed to maximize the opportunity for perjury. See *Brown* v. *United States*, 245 F. 2d 549, 555 (C.A. 8); *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo.); *United States* v. *Cross*, 170 F. Supp. 303 (D.D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D.D.C.); *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio).

[10] Of course, if the court of appeals' somewhat unusual application of due process notions in this case were correct, then the failure to apprise the subject of a proposed consent search of the Fourth Amendment right to refuse consent would similarly be unfair, the use of evidence obtained pursuant to such a search impermissible under due process notions, and this Court's decision in *Schneckloth* v. *Bustamonte*, *supra*, erroneous.

are thought most efficaciously served." *United States* v. *Calandra, supra,* 414 U.S. at 348. Assuming that some prior warning is required, it seems to us unlikely as an empirical matter that prosecutors would risk losing the use of confessions or other incriminating evidence for the sake of obtaining evidence of perjury.

Indeed, in the instant case the government provided respondent with all the warnings to which the court held she was entitled. The court of appeals found no indication that the government had acted in bad faith. Respondent's testimony was suppressed because of a factor over which the government had no control—her lack of understanding of the English language, which made the warnings ineffective. Under these circumstances in particular, when there is no showing of bad faith on the part of the government, suppression of the testimony from a subsequent prosecution for perjury serves no deterrent purpose whatsoever.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
ROBERT B. REICH,
Assistant to the Solicitor General.
PETER M. SHANNON, JR.,
LAUREN S. KAHN,
Attorneys.

NOVEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX A

United States Court of Appeals for the Ninth Circuit
No. 74–1636

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT
v.
ROSE WONG, DEFENDANT-APPELLEE

September 23, 1974

Appeal from the United States District Court for the Northern District of California

OPINION

Before: KOELSCH and SNEED, *Circuit Judges,* and FIRTH,* *District Judge.*

KOELSCH, *Circuit Judge:*

Appellee was subpoenaed to testify before the Grand Jury investigating illegal gambling and police payoffs in the Chinatown area of San Francisco. At that time the government already possessed incriminating evidence against her; she was a target of the Grand Jury's investigation and likely to be indicted.[1]

*The Honorable Robert Firth, United States District Judge for the Central District of California, sitting by designation.

[1] At the hearing the government's attorney acknowledged, and the district court found, that before appellee was subpoenaed, the government possessed testimony of two cooperating undercover San Francisco police officers that they had visited appellee at her illegal gambling house, that she had paid them bribes, and arranged for future payments; she was therefore a prospective defendant when called to testify.

Immediately before questioning appellee, the district attorney informed her of her privilege against self-incrimination, and of the possible consequences of testifying falsely. He then asked questions, tailored by his previously obtained knowledge of appellee's criminal involvement, true answers to which would have been incriminating. Appellee's false answers formed the basis for a subsequent perjury indictment. 18 U.S.C. § 1623.

Following her arraignment on the charge, appellee moved to suppress her answers. The district court determined, based on extensive evidence adduced by affidavit and at a hearing, that appellee, who was born in China and uses English only as a second language, had not understood that portion of the prosecutor's questioning designed to inform her of her right to remain silent.[2] Consequently the district court, relying on *United States* v. *Rangel,* 365 F. Supp. 155 (W.D. Tex. 1973), and the implications of statements in our decision in *Robinson* v. *United States,* 401 F. 2d 248 (9th Cir. 1968), ordered the testimony suppressed. The government has appealed. We affirm.

We emphasize at the outset that affirmance is rested not on the self-incrimination clause, but rather on the due process clause of the Fifth Amendment. The prejurious answers were induced by an unfair procedure violative of the latter clause. That unfairness stems from the threat the procedure poses to the values protected by the privilege.

The government correctly points out that the privilege against self-incrimination does not afford a defense to a witness under compulsion who, rather than refusing to answer (or, if improperly compelled

[2] The district court's resolution of the conflicting evidence is not clearly erroneous, and we are bound by the determination that she did not understand her rights.

to answer, giving incriminating answers), gives false testimony. *E.g., United States* v. *Knox,* 396 U.S. 77 (1969); *Glickstein* v. *United States,* 222 U.S. 139 (1911); *Robinson* v. *United States, supra; United States* v. *Orta,* 253 F. 2d 312 (5th Cir. 1958); *United States* v. *Parker,* 244 F. 2d 943 (7th Cir. 1957). The reason is fundamental: "The immunity afforded by the Constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury." *Glickstein, supra,* at 142. Because the judicial system is committed to interpreting the privilege against self-incrimination generously obviating totally the danger of oppressive governmental conduct both to those who remain silent and to those who unwillingly incriminate themselves because of improper governmental compulsion, the legal system reciprocally need not and cannot tolerate perjury. If a witness is improperly compelled to incriminate himself, he may do so and later be protected, but he may not avoid the object of the compulsion by perjury and be protected by the privilege (*United States* v. *Knox, supra,* at 82)—the judicial system cannot properly operate if it countenances the breach of trust implicit in that course. *See United States* v. *Orta, supra,* at 314–15.

But that principal is inapplicable to this matter. We cannot ignore the fact that the procedure employed by the goverment was fraught with the danger, if indeed not intended, of placing appellee in the position of either perjuring or incriminating herself. We agree with the Fifth Circuit that the government's use of such a procedure against a witness it knows to be virtually in the position of a defendant is unfair, unless accompanied by warnings which in fact apprise the witness of the right to remain silent and which thoroughly obviate the substantial danger created of

involuntary self-incrimination or perjury, and that the induced perjured testimony must be suppressed. *United States* v. *Rangel,* 496 F. 2d 1059 (5th Cir. 1974); *United States* v. *Mandujano,* 496 F. 2d 1050 (5th Cir. 1974). *See United States* v. *Kreps,* 349 F. Supp. 1049 (W.D. Wisc. 1972); *United States* v. *Fruchtman,* 282 F. Supp. 534 (N.D. Ohio 1968); *United States* v. *Thayer,* 214 F. Supp. 929 (D. Colo. 1963).

Unlike the situation with an ordinary witness,[3] the government knows in advance that when it subpoenas someone in appellee's position, a so-called "putative defendant," and asks directly incriminating questions, it is thereby placing the witness in a dangerous dilemma. The imposing ex parte nature of grand jury inquisitions, coupled with the predictable ignorance of many lay witnesses about the intricacies of the privilege against self-incrimination, creates a foreseeable probability that the witness will subject himself to criminal liability. Subpoenaing and questioning a witness under such circumstances is a form of governmental compulsion seeking to incriminate a witness out of his own mouth which threatens to circumvent the independent prosecutorial model mandated by the privilege. We cannot ignore the obvious fact that, while a few witnesses placed in such a position might honestly wish to confess, in the great majority of cases asking incriminating questions of a putative defendant, were the witness fully informed of his rights, would be an idle task, as the witness would

[3] While *Rangel* and *Mandujano* are the only precedents directly in point, prior decisions refusing to suppress perjury have intimated that the result reached would be different if the questions had been asked of a putative defendant. *See, e.g., Robinson, supra,* at 230; *Orta, supra,* at 314; *Parker, supra,* at 946–49.

simply remain silent. The utility of the procedure to the government, and its inherent unfairness and danger, lies in the wholly predictable fact that the witness will be ignorant of or not understand the right to remain silent, and be compelled by answering to subject himself to criminal liability. The government should not engage in such a practice.

We do not hold that the government may not question a putative defendant. Some witnesses may indeed wish voluntarily to confess, and all may have non-privileged information useful to the grand jury's task—witnesses have no privilege per se to refrain from giving incriminatory information against others. But before such information can be compelled, the danger created by compelling answers to incriminatory questions from a putative defendant must be thoroughly obviated by an effective warning of the right to remain silent. As the warning given here was not effective,[4] because not understood, the unfairness of the procedure remained undissipated, and due process requires the testimony be suppressed.

The judgment is affirmed.

[4] We do not intimate that the government acted in bad faith. On the contrary, the government's attorney carefully informed appellee of her rights and believed she understood them. Nevertheless, the government having employed a procedure calculated to exploit her lack of understanding, it runs the risk of a subsequent determination that its curative procedures were inadequate and the due process violation undissipated.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 74-1636—DC #73-0765

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ROSE WONG, DEFENDANT-APPELLEE

JUDGMENT

Appeal from the United States District Court for the Northern District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered September 23, 1974.

A True Copy Attest. November 7, 1974.

EMIL E. MELFI, Jr.,
Clerk.

By M. Turley
MARY TURLEY,
Deputy.

U. S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-635

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 22, 1974
CERTIORARI GRANTED JUNE 1, 1976

In the Supreme Court of the United States

No. 74–635

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Relevant Docket Entries	1
Portions of Respondent's Testimony Before the Grand Jury, September 7, 1973	2
Indictment	5
Respondent's Motion to Dismiss Indictment	7
Portions of Hearing on Respondent's Motion to Dismiss Indictment, January 29, 1974, and February 8, 1974	8
Order Granting Respondent's Motion, February 21, 1974	15
Order Allowing Certiorari	16

216-721—76——1

RELEVANT DOCKET ENTRIES

Date 1973	*Proceedings*
Nov. 29	Ord indictment filed, issue summons, ret-12-5-73 Filed indictment, issued summons.
Nov. 30	Filed notice of related cases (CR 73-761RHS, 73-762RHS, 73-763WTS, CR 73-764SAW.
Dec. 5	Filed ct ord that case is assigned to judge RHS for all fur proceedings. OJC.
Dec. 7	ORD; Deft pres for arraignment; cont'd to 12-14-73 for Plea-WOODRUFF Filed Deft's not of mo & mo for reassignment to be heard 12-14-73 Before Judge Schnacke. Filed Deft's not of mo & mo for reassignment to be heard 12-14-73/10:00am before judge Carter.
Dec. 14	ORD deft pres for plea, to set, & mo for reassignment; Plea of not guilty without prejudice to making any mos; Mo to reassign—Granted; Reassigned to Judge Zirpoli & Cont to 12-17-73/1:30 pm to set.
Dec. 17	Ord all P/T mos to be filed by 2-15-74. Contd to 1-22-74 @ 10 a.m. for jury trial. AJZ.
1974	
Jan. 14	Filed Stip and ord continuing hrg date to Jan 29, 1974 @ 1:30 pm. pr-tr ORD-Defts ex parte mo to con't pre-trial until 1-29-74 @ 1:30PM grntd.
Jan. 22	Filed mo to dism the indictment and mo for a hrg under Federal Rule 12(b) (4).
Jan. 28	Filed Government's response to Deft's mo to dism the indictment and for hrg.
Jan. 29	Ord case contd to 2-8-74 @ 10 a.m. for fur hrg on deft's mo to dism.
Jan. 31	Filed Affidavit in support of Gov't Response to Deft's mo to dism.
Feb. 7	Filed Deft's supplemental memo in support of deft's mo to dism the indictment. Filed Memo in support of Government's Response to Deft's Mo to Dism.
Feb. 8	Ord on for evidentiary hrg on deft's mo to suppress. evid. introdured after hrg the ct granted the deft mo to suppress. Deft counsel to prepare the ord. AJZ. Filed record of evid hrg on mo to suppress.
Feb. 21	Filed Order that Deft's testimony of Sept. 7-73 before the Grand Jury is suppressed for the use of evidence in this case (AJZ).
Feb. 25	ORD; Deft pres for jr tr. Govmt will file an appeal on ord granting to suppress, case cont'd to 10-29-74 @ 10:00 for jr tr.
Mar. 20	Filed notice of appeal by Pltf to the 9th CCA (appealing the ord suppressing evidence entered 2-21-74).
Apr. 10	Made and mailed record on appeal to 9th CCA.

Proceedings Before the Grand Jury for the Northern District of California

Reporter's Transcript

September 7, 1973

TESTIMONY OF ROSE WONG

Appearances

For the United States of America: ROBERT D. WARD, Assistant United States Attorney, 450 Golden Gate Avenue, San Francisco, California.

Friday, September 7, 1973

The FOREMAN. Do you solemnly swear that in the matters concerning which you are about to testify before this United States Grand Jury in and for the Northern District of California, you will tell the truth, the whole truth, and nothing but the truth, so help you God?

The WITNESS. Yes, I do.

The FOREMAN. Would you sit down, Miss—your name please?

The WITNESS. Wong, Rose Wong.

The FOREMAN. Miss Wong, let me just tell you who we are. We are the Federal Grand Jury for the Northern District of California.

This is the secretary, I'm the Foreman, this is the Deputy Foreman, these are the United States Attorneys, this is the stenographer and these are the jurors.

Mr. Attorney?

EXAMINATION BY MR. WARD

Q. Is it Miss or Mrs. Wong?

A. Mrs.

Q. Mrs. Wong, my name is Robert B. Ward and this is Mr. Hinckeley. Both of us are attorneys for the Justice Department.

This Grand Jury is investigating certain alleged violations of Federal Law, including the gambling laws, within the Chinatown area.

You have been subpoenaed to testify here because the Grand Jury feels that you have information which may be helpful in their investigation.

Prior to my asking certain questions, let me advise you of certain rights which you are entitled as a witness here.

You, of course, need not answer any question which you fell may tend to incriminate you.

A. Uh huh.

Q. The Fifth Amendment of the United States Constitution gives you the right to refuse to answer any question which you feel might incriminate you.

Do you understand that, mam?

A. Yes.

Q. Further, if you do give an answer, that answer may be used against you in a subsequent criminal prosecution, if in fact the Government should decide to prosecute you for any crime. Any statements you make here may be used against you.

Do you understand that?

A. Yes.

Q. You also have the right to consult with an attorney prior to answering any question here today. Do you understand that?

A. Yes.

Q. Have you consulted with an attorney?

A. No.

Q. Please be advised that should the occasion arise in which you do not want to proceed without talking to an attorney, that you have the right to notify us, and we will stop the proceeding and you may consult with an attorney prior to continuing with the questioning.

Do you understand that, mam?

A. Yes.

Q. Further, if you cannot afford an attorney, that we would see that an attorney is afforded to represent you.

Do you understand that?

A. Yes.

Q. Having sworn to tell the truth, Mrs. Wong, it is incumbent upon you to tell the truth, if you do answer any questions and should you knowingly give any false testimony, or false answers to any questions, you would be subject to prosecution for the crime of perjury under the Federal Laws.

Do you understand that?

A. Yes.

Q. Do you know what perjury is?

A. Not very well.

Q. Well, in essence perjury means telling a lie under oath. Do you understand what that is?

A. Yes.

Q. Do you know the difference between lieing and telling the truth?

A. Yes.

Q. Under oath?

A. Uh huh.

The FOREMAN. Mr. Ward, you might advise Mrs. Wong that the stenographer needs her answers.

Mr. WARD. Q. Mrs. Wong, the Foreman points out that you must answer each question. You can't nod your head or mumble. She has to take down an answer.

Do you understand that?

A. Oh, I see that.

Q. She is writing down all the questions and answers.

A. I see.

Q. With respect to perjury, as we have discussed it, let me advise you that the Federal crime of perjury, before a Grand Jury, carries a penalty of five years imprisonment. That is a maximum penalty and/or $10,000 fine.

* * * * *

Q. Have you ever given any money or gifts to any police officers in Chinatown?

A. No.

Q. Have you ever given any money or gifts to the people whose pictures are there in Exhibits No. 1 and 2?

A. No.

Q. Have you ever given any money or gifts to any uniformed officers?

A. No, sir.

Q. Any plain clothes officers?

A. No.

Q. Do you know where there's any place ir Chinatown where people gamble?

A. No. I rarely go around because I always stay around 31 Spaufford or else I go to Chinese show.

Q. Have you and Sam Chai ever met with any police officers to discuss gambling?

A. No.

* * * * *

In the United States District Court,
Northern District of California
Criminal No. CR 73 0765AJZ

Violation: 18 U.S.C. 1623—False Declarations Before a Grand Jury

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSE WONG, DEFENDANT

Indictment

The Grand Jury Charges: THAT

1. On or about the 7th day of September, 1973, in the City and County of San Francisco, State and Northern District of California, a grand jury of the United States, in and for the Northern District of California, was conducting an investigation into possible violations of Federal laws prohibiting the operation of illegal gambling businesses (Title 18, United States Code, Section 1955) and the obstruction of state and local law enforcement (Title 18,

United States Code, Section 1511) with a purpose of determining whether any persons violated such statutes.

2. At the time and place aforesaid, ROSE WONG, the defendant, did willfully and knowingly make a false material declaration while testifying under oath in a proceeding before said grand jury in that she testified as follows:

Mr. WARD. Q. Have you ever given any money or gifts to any police officers in Chinatown?

Mrs. WONG. A. No.

Q. Have you ever given any money or gifts to the people whose pictures are there in Exhibits No. 1 and 2?

A. No.

Q. Have you ever given any money or gifts to any uniformed officers?

A. No, sir.

Q. Any plain clothes officers?

A. No.

* * * * *

Q. Have you and Sam Chai ever met with any police officers to discuss gambling?

A. No.

* * * * *

3. The aforesaid declarations of ROSE WONG, the defendant, as she then and there well knew and believed, were false in that ROSE WONG had given money to Gurnie L. Cook, the police officer pictured in Grand Jury Exhibit No. 2 and that ROSE WONG and Sam Chai had met with a police officer to discuss gambling.

All in violation of Section 1623 of Title 18, United States Code.

A true bill.

/s/ HAYBERT K. HOUSTON,
Foreman.

/s/ JAMES L. BROWNING, Jr.,
United States Attorney.

/s/ ROBERT D. WARD,
Special Attorney, United States Department of Justice.

In the United States District Court,
Northern District of California

Criminal No. 73 0765 AJZ

Motion To Dismiss the Indictment and Motion for a Hearing Under Federal Rule 12(b)(4)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSE WONG, DEFENDANT

DEFENDANT ROSE WONG hereby moves this Court to dismiss the indictment filed against her on November 29, 1973. This motion is made on the following grounds:

1. The indictment violates her rights to due process of law and her right against self-incrimination because it was obtained without the benefit of an interpreter which she needed in order to understand the grand jury proceedings upon which the indictment is based.

2. The testimony alleged to be perjurious was not material to the grand jury investigation, since the prosecutor who elicited her testimony had access to alleged earlier statements by defendant on the same subject and called her with a perjury indictment in mind.

3. The indictment is invalid because the testimony on which it is based was obtained without fully and specially warning defendant of the consequences of her testimony.

4. The indictment violates defendant's right to due process of law because it is based on testimony before a grand jury which was improperly convened in that the President failed to appoint and convene a legislatively-mandated National Commission on Individual Rights, and

5. The statute under which she is indicted is unconstitutional.

This motion is based on this motion and the accompanying memorandum of points and authorities, the affidavits of Allan Brotsky, Mark Deines, Roderick Auyang and Ruth Friedman, the records and files of this case, and oral argu-

ment to be presented at a hearing now scheduled for January 29, 1974, at 1:30 p.m., in the Courtroom of the Honorable Alfonso Zirpoli, United States District Court, San Francisco, California.

Dated: January 22, 1974.

GARRY, DREYFUS, MCTERNAN & BROTSKY.

By: /s/ Ruth M. Friedman.

In the United States District Court, Northern District of California

CR. No. 73-765 AJZ

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSE WONG, DEFENDANT

Before: Honorable ALFONSO J. ZIRPOLI, *Judge*

Reporter's Transcript

Tuesday, January 29, 1974
Friday, February 8, 1974

Appearances

For Plaintiff: ROBERT D. WARD, Esq., Special Attorney, Department of Justice, P.O. Box 36132, 450 Golden Gate Avenue, San Francisco, California 94102.

For Defendant: Messrs. Garry, Dreyfus, McTernan & Brotsky, Attorneys at Law, 341 Market Street, San Francisco, California; By: ALLAN BROTSKY, Esq. (1-29-74 & 2-8-74) and RUTH FRIEDMAN, Esq. (1-29-74).

* * * * *

3 Tuesday, January 29, 1974

The CLERK. Criminal Case 73-0765, United States of America versus Rose Wong, for pretrial motions.

The COURT. All right, may I have the file?

Mr. WARD. Good afternoon, Your Honor. Robert D. Ward appearing on behalf of the United States.

Mr. BROTSKY. Allan Brotsky and Ruth Friedman appearing for the defendant Rose Wong.

4-23 * * * * *

24 The COURT. * * * When the evidence is all in, I will have to conclude, first of all, whether in truth and in fact she understood these particular questions which relate to her rights; and then if I conclude that she understood them, I suppose I would have to just deny the motion. If, on the other hand, I conclude that she didn't understand them, then I have to give consideration to still another question, which ' what significance must I attach, in light of this case, to the fact that she didn't? Is that still enough to merit a dismissal? Or is the government correct, that even if that were true, you would still have no right to dismiss?

Mr. BROTSKY. Fair enough. I just wanted to say this. One of the questions that underlies this whole matter. . . . And, by the way, I want to make it clear that no criticism is intended here of the prosecutor who appeared before the Grand Jury.

The COURT. I understand that.

Mr. BROTSKY. I think what you have here is a distinction between what the Supreme Court in this Chinese

25 language case that they just handed down, giving the Chinese students in the schools of San Francisco the right to be taught in Chinese—they make a distinction between a laissez faire attitude and an affirmative action attitude. I think that's what is involved here. Where you have a Mrs. Wong, you have to——

The COURT. Oh, that affirmative action is based upon the obligation of the government and the court to promote the rights of individuals. And while there may be an obligation to promote here, I don't know that I could use the school case in any manner as authority for anything I may decide here.

Mr. BROTSKY. I doubt that, too. But I think the concept is a helpful one.

The COURT. I want to say to the United States Attorney, I have read the transcript and I agree with counsel, there couldn't possibly be any question as far as the conduct of the United States Attorney is concerned. Certainly it would be difficult to anticipate a motion of this character in the light of the circumstances existing at the time. I think that you did just about everything, in a sense, you could reasonably be expected to do. I don't know what experience you have had with people who are not familiar with the English language, or in particular the Chinese.

Mr. WARD. Well, none, particularly with the Chinese, Your Honor. I have had experience in the past with
26 Spanish speaking people.

Mr. BROTSKY. Some of us have even grown up in San Francisco or been here a long time and have had the good fortune of having had more experience than someone who might have lived elsewhere.

The COURT. We'll see what this hearing produces and will continue the matter until that time.

May I ask you one other question? Assuming for the moment—and this is no indication at all as to what the Court will or will not do—that the Court were to conclude that she didn't understand those two particular questions which I read, what would be the position of the government then?

Mr. WARD. Well, I would have to review it. But I think at this point I would say that the government would still take the position that the indictment is valid.

The COURT. I would suggest that you gentlemen give some thought to that question. If you want to submit a short memorandum on that question alone, I would be interested in having your views set forth.

Mr. BROTSKY. Very well.

29 Friday, February 8, 1974

The CLERK. Criminal Case 73–765, United States of America versus Rose Wong, further hearing on defendant's motion to dismiss.

Mr. BROTSKY. That's ready for Defendant Rose Wong, and she is present in court, Your Honor.

The COURT. Yes.

Mr. BROTSKY. I am ready to proceed at this time.

Mr. WARD. Good morning, Your Honor. Robert Ward appearing on behalf of the United States.

The COURT. Now, I have read these briefs, and of course one of the ultimate questions will be present regardless of whether she understood a particular question; that relates to the privilege against self-incrimination.

The other question is whether she understood the remainder of the questions propounded before the Grand Jury.

Mr. BROTSKY. We don't raise any serious doubt on that.

The COURT. I have read the transcript. Her answers—whether they are truthful or not is another thing, but they clearly indicate a full understanding of the questions.

Mr. BROTSKY. We make no opposite contention.

30–32 * * * * *

33 Mr. BROTSKY.

* * * * *

34 Oh, and incidentally, Your Honor, if I may break my chain of thought here for a moment, I want to say at the very outset also that we may have misconceived our remedy technically for what occurred here. I would like to ask the Court at this time, without the necessity for our filing any written motion to that effect, because I don't think there will be any prejudice to the government, to deem this a motion to suppress.

The COURT. The testimony?

Mr. BROTSKY. The testimony before the Grand Jury.

The COURT. Yes, I understand. That technically is the more appropriate procedure.

Mr. BROTSKY. I now so move the Court.

The COURT. All right.

35–97 * * * * *

98 The COURT.

* * * * *

That's the big problem now. I would say very frankly, it may very well be that this whole question resolves itself exclusively now on the question of whether or not she was

a target as a putative defendant; because as far as the question of being adequately warned of her constitutional rights, I'm satisfied that under the normal tests she was adequately warned. I'm further satisfied that she understood everything that transpired in the Grand Jury room, except for the first four or five pages. And, very frankly, I am amply convinced she did not understand that.

* * * * *

99 I'm really satisfied that as far as the rest of the testimony is concerned, she understood the questions and gave the answers she wanted to give. And the Court feels that the purpose of her answering in the manner in which she did may very well be that which was offered in the affidavit of Mr. Au Yang. This woman is obviously an intelligent woman. Nevertheless, despite the fact that she's obviously an intelligent woman, and that she understood all the questions except those I've just outlined, I'm still satisfied she didn't understand those questions. And those questions related to constitutional rights which she would appear to be entitled to understand. Certainly the ruling of Judge Sears in the case of United States versus Rangle (phonetic), 365 Fed. Supp. 155, and I would say in the Robinson cases on which the Government relied—in all of those cases, they make a substantial distinction when they get to Grand Jury proceedings between a witness and one who is a putative defendant. Even Judge Madden of the Ninth Circuit made that particular distinction; and I think it's a valid distinction.

100 Under the circumstances, the Court would be prepared to and does grant the motion to suppress.

* * * * *

101 The COURT.

* * * * *

It's obvious to me that part of the reason for calling this woman was to make a case against her, specifically, and others, other officers, with whom she would be a co-conspirator.

Now, the Government might elect not to name her as a co-conspirator, but nevertheless the purpose of it was to make a conspiracy case in which she would be a co-conspirator. I'm satisfied that for me to draw any other conclusion is to close my eyes to the realities of the evidence that I have before me.

Mr. WARD. Well, Your Honor, it's certainly different than in the Rangle decision, in which the Government did indict for the substantive offense at the same time they indicted for perjury.

The COURT. Well, the Government didn't indict for the substantive offense here because the party committed perjury and didn't implicate himself. If she had incriminated herself, she would have been indicted for conspiracy. That's the point. And since she was there as a putative

102 defendant and not as a witness, I think that the case of Judge Sears applies. I think that's a valid, clear distinction, and in my view it comes within a valid distinction to be drawn by the very language used by Judge Madden.

I haven't any doubt that she understood the rest of it, and I haven't any doubt that had she been an ordinary witness, she would have been required to answer to this Court for the charge of perjury. But she was a putative defendant.

Mr. WARD. Well, going back to that, Your Honor, she's testified herself that she didn't understand most of the questions—which I think brings us to a very serious credibility question in this case, not attempting to——

The COURT. Well, I say she is an intelligent woman. The last observation you made about her not understanding was—I agree with you. But I cannot. * * * I am convinced in my own mind that those constitutional privilege questions were not understood by her. They are difficult to understand by a man well-learned in the English language, in and of itself. And I say to you that one with her background, her culture, her lack of contact with the cultural element that would have some more specific knowledge about this * * *.

Although she did have gambling contacts, that does not indicate to me that she understood the sophisticated terms here.

103–108 * * * * *

109 Mr. WARD. But, Your Honor, the Courts seem to say that when a person commits perjury, he's got no right to allege any unconstitutional action on the part of the Government. Anything——

The COURT. He has when the perjury is committed because the Government brought him in not for the purpose of getting his testimony, but clearly for the purpose of involving him in criminal activity. He's not an ordinary witness. I don't know how you can think of a more putative defendant than one who's a reputed dealer and owner and giver of money in a conspiracy to bribe police officers. How can you get a better defendant target than Mrs. Wong? She's ideally a defendant target. And she was, and she was brought in. And I must conclude that that was the reason she was brought in. I might be mistaken, but * * *.

Mr. WARD. May the record——

The COURT. Yes?

Mr. WARD. The Government did attempt to warn the witness the best——

The COURT. No question about it. No question. But it wasn't effective. But you did. Under normal

110 circumstances, if the individual understood English, that would have been a full, complete and adequate warning. But unfortunately, the testimony leads one to the conclusion that Mrs. Wong did not understand these questions. And I have to not only rely upon the very nature of the questions and the answers which she gave, and the proof within the questions and answers themselves that she didn't understand, but substantially on the testimony of the professor, which clearly corroborates it and indicates that there are at times a disposition on the part of some individuals such as Mrs. Wong, with her lack of appropriate understanding of the language, to at times say yes when they didn't understand at all. And this record proves it, when it came to the previous perjury question, where she

said yes and still didn't know what perjury meant and had to have it explained. Then she understood, yes.

* * * * *

In the United States District Court, Northern District of California

Criminal No. 73 0765 AJZ

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSE WONG, DEFENDANT

Order

Defendant's motion to suppress her testimony of September 7, 1973, before a grand jury of this District pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, came before this Court for hearing on February 8, 1974. Defendant was present with her counsel, Allan Brotsky and Ruth Friedman, and the United States appeared through its attorney, Robert D. Ward. The Court heard oral testimony by Dr. William W-J. Wang, Rose Wong, and Robert D. Ward, and received other evidence. Having considered all of the evidence and the affidavits on file in support of the motion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

Defendant's testimony of September 7, 1973, before the Grand Jury is suppressed for the use as evidence in this case.

Dated: February 21, 1974.

/s/ ALFONSO J. ZIRPOLI,
U.S. District Judge.

Supreme Court of the United States

No. 74-635

UNITED STATES, PETITIONER

v.

ROSE WONG

Order Allowing Certiorari

Filed June 1, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1976

Supreme Court, U. S.
FILED
FEB 24 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-635

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ROSE WONG, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ALLAN BROTSKY,
1256 Market Street,
San Francisco, California 94102,
Telephone: (415) 864-3131,
Attorney for Respondent.

PERNAU-WALSH PRINTING CO. - 563 MISSION STREET - SAN FRANCISCO, CA 94105

Table of Authorities Cited

Cases	Pages
Brooks v. Beto (5th Cir. 1972), 468 F.2d 1284	4
Miranda v. Arizona (1966), 384 U.S. 436	3, 5
United States v. Fruchtman, 282 F.Supp. 534 (N.D. Ohio 1968), cert. den., 400 U.S. 849	5
United States v. Luxemberg (1967), 374 F.2d 241	5
United States v. Mandujano (1974), 496 F.2d 1050	2, 3, 4
United States v. Rangel (1974), 496 F.2d 1059	5

Statutes

18 U.S.C.:	
Section 1511	2

Texts

Watergate, Andre Deutsch, 105 Great Russel Street, London, WC1	3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-635

UNITED STATES OF AMERICA, *Petitioner,*

VS.

ROSE WONG, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Rose Wong, the respondent in the above proceeding, files this response to the government's petition for a writ of certiorari, at the invitation of the Court.

The government, by its petition for a writ of certiorari here, would drag the nation back to the period before Watergate. The government would ignore the cleansing, therapeutic effect of the judicial and Congressional process which brought to an inglorious end the assertion of unbridled, arrogant power of the government over its people. The government, in its petition, rejects the fundamental fairness which the Fifth, Sixth, and Ninth Circuits require the governors to maintain toward the governed.

1. Fairness is what is explicitly at stake in the grant or denial of certiorari in this case. The government, accumulating evidence of the federal offense of obstruction of state and local law enforcement (18 U.S.C. 1511), had "testimony of two cooperating undercover San Francisco police officers that . . . [respondent] had paid them bribes, and arranged for future payments. . ." (Opinion of the Court of Appeals, below, footnote 2). Respondent, thus a "prospective defendant" (id.), was summoned before a grand jury and, without warning of her right not to be required to incriminate herself,[1] was asked questions which the government attorney knew she would have to answer untruthfully or confess to a crime.

Respondent, and her questioner, were exactly in the position eloquently described by the Court of Appeals in *United States v. Mandujano* (1974) 496 F.2d 1050. If the questioning attorney, that court said, "actually anticipated an answer, he must have known that the response would require Mandujano to confess to a crime or commit perjury," hence the questioner was "primarily baiting Mandujano to commit perjury." Under such circumstances, Mandujano's "only 'safe harbor' was to remain silent—a right of which the government failed to inform him."

Respondent, as did Mandujano, had a due process right not to be baited into committing perjury.

[1]The government necessarily does not challenge the finding by the district court that respondent, due to her lack of facility with the English language, did not understand the attempted warning against self-incrimination tendered to her.

It is almost inconceivable, in days following the recent national trauma, that the government would urge this Court to proceed in violation of such fundamental concepts of fairness. The British publishers of *Watergate*[2] correctly describe their book as making clear that the Nixon White House "bizarre catalogue of 'dirty tricks' was the almost inevitable product of an Administration that valued its own survival above loyalty to principles or to a system of government."

Unhappily ready to resume disloyalty to a principled order, the government now urges the Fifth Amendment be treated with as much disrespect as the Fourth Amendment suffered from that Administration. But that course is not the law and is not in the interest of the country. The Fifth Amendment, said the court in *Mandujano*, supra, "must always be as broad as the mischief against which it seeks to guard." The Court of Appeals below, and the several courts of appeals whose opinions were its progenitors (infra), found the due process clause of that Amendment to be broad enough to protect respondent against the fundamental unfairness the government sought to inflict upon her.

The government argues, in its petition, that respondent, summoned to appear before the grand jury, was not under that compulsion to self-incrimination that assertedly must exist to bring Fifth Amendment protection into operation, to require *Miranda*[3] warning prior to testifying. But this ignores at once estab-

[2]Andre Deutsch, 105 Great Russel Street, London, WC1.

[3]*Miranda v. Arizona* (1966) 384 U.S. 436.

lished law on what constitutes "custodial interrogation" and the reality of the position of an adverse witness before a foreboding, hostile grand jury.

The most significant hallmark of identification of a "custodial interrogation," hence one requiring a Miranda warning, is "whether or not the focus of the investigation has finally centered on defendant." *Brooks v. Beto* (5th Cir. 1972) 468 F.2d 1284.

Respondent's status before the grand jury admits of no possible doubt. The government cannot and does not question the determination of the Court of Appeals that "she was a target of the Grand Jury's investigation and likely to be indicted." Her testimony was elicited in every sense under the most hazardous compulsion.

The government seeks to distinguish one who is a putative or virtual defendant when called as a witness before a grand jury, from one questioned in "custodial police interrogation," which the government acknowledges to be "inherently coercive and difficult to supervise by neutral authority." This is nothing like "a grand jury setting." the government pleads, "where questioning takes place before 23 private citizens, under the supervision of a presiding judge," and where a witness can sometimes obtain a continuance.

The government, by this benign estimate of the comforts assertedly characteristic of a compulsory grand jury appearance by a virtual defendant, on whom an inquiry has centered, deals with form and not substance. Such a witness knows he (often, and in this case, she) is in deep trouble with the federal

government, a huge and intimidating entity. Whatever else she knows, she knows the function of a grand jury is to start a criminal proceeding, to indict. No "presiding judge," or any judge, is in the secret, private room to which she is taken, nor may her lawyer enter. The "23 private citizens" are apparent allies of the prosecutor who questions her, and necessarily appear as multiple oppressors, certainly not guardians of her liberty.

To such a witness, the experience cannot be less than terrifying, the setting one that cries out for the minimum exercise of fundamental fairness represented by a *Miranda* warning. This is the sound basis for the decisions of the district court and the Court of Appeals below, and for comparable decisions in the Fifth[4] and Sixth[5] Circuits. The government's unbecoming assault in its petition upon decency, fairness and equity must be rejected. The vitality of due process, upon which the decision of the Court of Appeals expressly rests, demands no less.

2. The government, in its petition, equally complains of the remedy found appropriate by the Court of Appeals for failure effectively to warn her—suppression of respondent's testimony. Freely calling on the exacerbating accusation that the remedy furnishes respondent with "a license to commit perjury," the government protests that even if its conduct were un-

---

[4] *United States v. Mandujano,* supra; *United States v. Rangel* (1974) 496 F.2d 1059.

[5] *United States v. Luxemberg* (1967) 374 F.2d 241; *United States v. Fruchtman,* 282 F.Supp. 534 (N.D. Ohio 1968), cert. den. 400 U.S. 849.

fair, even if effective warnings were required but omitted, the deterrent of suppression is not warranted because the Court of Appeals "found no 'bad faith'" on the part of the prosecutor.[6]

But the government's protests evade the point made by the Fifth Circuit and by the court below. That is, without reaching bad faith or "improper motives," as the court put it in *Mandujano,* supra, the courts correctly recognize that to make a likely defendant a grand jury witness, then ask her the questions the government knows must produce a confession or perjury, without effective warning of a constitutional right not to answer, constitutes government misconduct not to be condoned any more than extracting confessions with a nightstick.

The question, said the court in *Mandujano,* supra, is "one of the supervision of the conduct of government representatives in the interest of fairness." That court properly held its duty to be to deter "prosecuting officers from bringing a putative or virtual defendant before the grand jury, for the purpose of obtaining incriminating or perjurious testimony."

The court below said much the same thing: ". . . [T]he government having employed a procedure calculated to exploit [respondent's] lack of understanding [of English], it runs the risk of a subsequent determination that its curative procedures were inadequate and the due process violation undissipated."

[6]What the Court of Appeals said, in the final footnote to its opinion, was "We do not intimate that the government acted in bad faith."

Suppression is the only effective remedy, and is the only effective deterrent to such blatantly unfair and improper conduct. Prosecutors will not be deterred from such procedures if they know the worst they will suffer is inability to use a confession they don't have but might extract, but will have the opportunity to add a perjury count to the indictment or information they already have in preparation for the hapless witness.

The decision below interferes not one whit with the effective functioning of the grand jury. It insists only that the warning, which the government itself purported to give, be effective. Having determined to give Rose Wong the warning, the government overreaches when it flays its own conduct as unnecessary, since it was simply wanting by its own original intention.

The eminently sound conclusion of the Court of Appeals, and those of its predecessors in the Fifth and Sixth Circuits, bring distinction to the federal judicial system, and invite confidence of the people in the integrity of their government. The petition for a writ of certiorari must be denied.

Dated, San Francisco, California,
February 20, 1975.

ALLAN BROTSKY,
Attorney for Respondent.

Supreme Court, U. S.
FILED
JUN 18 1976
MICHAEL RODAK, JR., CLERK

No. 74-635

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR SUMMARY DISPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-635

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR SUMMARY DISPOSITION

The Solicitor General, on behalf of the United States, respectfully moves that this case, now pending in this Court on grant of the government's petition for a writ of certiorari,[1] be summarily reversed and remanded to the court of appeals for reconsideration in light of *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976.

STATEMENT

A detailed statement of the pertinent facts is set forth in our petition for a writ of certiorari (pp. 2-5). Briefly, respondent testified in September 1973 before a grand jury in the Northern District of California investigating violations of 18 U.S.C. 1955 (illegal gambling businesses) and 18 U.S.C. 1511 (obstruction of state and local law

---

[1]No. 74-635, certiorari granted June 1, 1976.

enforcement). Prior to testifying, the prosecutor warned respondent of her right to refuse to answer incriminating questions and told her that she could consult with an attorney before answering any questions. In addition, the prosecutor carefully explained to her the meaning of perjury and the penalties to which she might be subjected if she perjured herself.

The prosecutor then asked respondent if she had ever given money or gifts to any police officers and if she had ever met with police officers to discuss gambling. She denied that she had engaged in any such activities. At the time she was asked these questions, the government had evidence that she had paid bribes to certain police officers, who had turned the money over to the Federal Bureau of Investigation. The questioning was designed to elicit names of any officers who had not cooperated with the government, and who therefore would be indictable (Tr. 97).

Respondent subsequently was indicted for perjury, in violation of 18 U.S.C. 1623, on the basis of her denials to the grand jury that she had ever given money or gifts to any police officers or discussed gambling with them. Respondent moved to dismiss the indictment, alleging, *inter alia*, that the indictment was invalid because the testimony on which it was based was obtained without her having been effectively advised of her Fifth Amendment rights. The district court granted the motion on the ground that, although respondent had been given "a full, complete and adequate warning" of her privilege against self-incrimination prior to testifying, her grand

jury testimony must be suppressed because her lack of proficiency in the English language prevented her from understanding the warning.[2]

The court of appeals affirmed. Relying in large part upon the opinions of the Court of Appeals for the Fifth Circuit in *United States* v. *Mandujano*, 496 F. 2d 1050, and its companion case, *United States* v. *Rangel*, 496 F. 2d 1059, which it termed "the only precedents directly in point" (Pet. App. 4a, n. 3), the court of appeals here reasoned that "[t]he perjurious answers were induced by an unfair procedure violative of the [Due Process Clause of the Fifth Amendment]" (Pet. App. 2a). The unfairness stemmed, according to the court, from the fact that respondent was a "target" of the grand jury's investigation and had been asked questions about her involvement in the matter under investigation which were "tailored by [the prosecutor's] previously obtained knowledge of [that] involvement, true answers to which would have been incriminating," and which therefore placed respondent "in the position of either perjuring or incriminating herself" (Pet. App. 2a). Such unfairness was not remedied by the explanation of Fifth Amendment rights administered by the prosecutor, according to the court, since respondent had not understood the explanation (Pet. App. 5a, n. 4).

DISCUSSION

Both in terms of its facts and of the analysis of the legal issues by the court of appeals, this case parallels *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976. While no opinion in *Mandujano* commanded a

---

[2]The district court stated that respondent understood the questions to which she allegedly gave false answers (Tr. 98-99) and also understood what perjury meant (Tr. 110).

majority of this Court, we believe it is nevertheless clear from all three opinions that the decision in *Mandujano* is dispositive of the present case. Accordingly, we respectfully suggest that little useful purpose could be served by this Court undertaking plenary review and that it would be appropriate instead to remand the case to the court of appeals for further consideration in light of *Mandujano*.

1. There are no material factual distinctions between the instant case and *Mandujano*. In both cases, the defendant was called to testify before a grand jury investigating criminal activity of a kind with which he or she was known to have some involvement. Mandujano was subpoenaed to testify before the grand jury precisely because of his known connection with heroin distribution activities (plurality slip op. 19); here, respondent likewise was called because of her known attempts at bribery of police officers and the belief that she would possess information about police corruption (Tr. 97). In both cases, the questions to which allegedly perjurious answers were given focused upon the witnesses' participation in unlawful activities about which the prosecutor already possessed specific information. Moreover, both cases involve perjury prosecutions, rather than prosecutions for the underlying activities about which the witnesses were questioned.

The only arguably relevant factual distinction that we can perceive between the two cases is the finding in the instant case that respondent, because of her imperfect comprehension of the English language, did not understand the explanation of her testimonial privilege that was given to her at the time of her appearance before the grand jury (and that was substantially the same as the explanation of rights supplied to Mandujano).

While there was no finding that Mandujano's understanding of English was similarly impaired, this difference does not supply a basis for reaching a different result in the instant case, for it is plain that the court of appeals in *Mandujano* believed that the allegedly inadequate warnings he had received were equivalent to receipt of no warnings, since it concluded that, as a result of the inadequacy of the warnings, exercise of the privilege against self-incrimination was effectively foreclosed and Mandujano was left with a "Hobson's choice" between self-incrimination and perjury (496 F. 2d at 1056-1057).

Since the conduct of the government prosecutors in connection with the grand jury proceedings was precisely the same in all material respects in the two cases, and since respondent and Mandujano were both charged with perjury, the failure (if any) to tender an adequate or effective explanation of rights to these two "putative defendant" witnesses affords no ground to avoid a perjury prosecution under the clear import of all three opinions in *Mandujano*.

2. There is no substantial difference in the analyses of the courts of appeals in the two cases that would justify separate consideration by this Court of the instant case. Essentially, the Ninth Circuit in this case adopted the reasoning and relied upon the precedent of the Fifth Circuit's decision in *Mandujano* and its companion case, *United States* v. *Rangel*, 496 F. 2d 1059. Both the Ninth Circuit and the Fifth Circuit rested their holdings upon the proposition that the Due Process Clause of the Fifth Amendment is offended when a "putative defendant" is called before the grand jury without comprehensive and effective warnings of rights (Pet. App. 2a; 496 F. 2d at 1058). If anything, the government's position is somewhat stronger in the instant case because of the court of appeals' explicit recognition that

there was no actual bad faith on the part of the government in the grand jury proceedings (Pet. App. 5a, n. 4). There is accordingly no reason to suppose that the court of appeals would not apply the result in *Mandujano* to the instant case, were this case summarily remanded.

3. Moreover, we submit that it is clear from the opinions in *Mandujano* that all eight Justices who participated in that decision would also reverse the court of appeals' decision in the instant case. While there was not a unanimity of opinion as to the scope of the government's obligations to warn grand jury witnesses, it seems plain that there was agreement upon the proposition—controlling in this case—that the impropriety of questioning, if any, affords no defense to a charge of perjury in cases such as this. Thus, Mr. Justice Brennan observed in his concurring opinion that he was satisfied (on a record essentially the same as that in the instant case) "that the respondent's false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment" (slip op. 1). And Mr. Justice Stewart, also relying on the *Bryson-Knox-Glickstein* line of cases for the proposition that the impropriety of questioning is ordinarily no defense to a perjury charge, stated, in words fully applicable to this case, that he joined in reversal because "this is not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process" (slip op. 1).

4. There are, of course, important unresolved issues concerning the obligations of prosecutors with respect to grand jury witnesses who are suspected of having engaged in criminal activities of a kind that the grand jury is investigating. One such question, before this Court in

United States v. *Washington*, No. 74-1106, certiorari granted June 1, 1976, is whether a prospective defendant's grand jury testimony should be suppressed in a trial on an indictment charging the substantive offense about which he was questioned before the grand jury, when he was not warned that he was a "target" of the grand jury's inquiry. But where, as here, the charge is perjury, and no force or trickery was used to induce the defendant to testify before the grand jury, the result is clearly controlled by *Mandujano*.

In view of the foregoing, we respectfully suggest that it would not be a fruitful utilization of the Court's resources to undertake plenary consideration of the instant case, but that the case instead should be remanded to the court of appeals for reconsideration in light of *Mandujano*. Such summary disposition is particularly desirable in light of the fact that this case is still at a pretrial stage, having already been delayed more than two years by this interlocutory litigation; summary disposition, therefore, will enable the trial to proceed without further significant delay.

CONCLUSION

The judgment of the court of appeals should be summarily reversed and the case remanded to that court for further consideration in light of this Court's decision in *Mandujano*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

DOJ-1976-06

Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

No. 74-635

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ANDREW L. FREY,
Deputy Solicitor General,

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General,

MICHAEL E. MOORE,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statute involved	2
Statement	3
Summary of argument	9
Argument	11
A "putative defendant" called as a grand jury witness is not entitled to have her grand jury testimony suppressed in a perjury prosecution on the ground that she did not understand the government's warning concerning her "right to remain silent"	11
A. The privilege against compulsory self-incrimination does not require suppression of allegedly perjured grand jury testimony	12
B. Prosecution for perjury under the circumstances of this case does not violate the Due Process Clause	15
Conclusion	23

CITATIONS

Cases:

Beckwith v. *United States*, No. 74-1243, decided April 21, 1976	21
Brown v. *United States*, 245 F. 2d 549	20
Bryson v. *United States*, 396 U.S. 64	10, 13, 15, 18

Cases—Continued

	Page
Davis v. *North Carolina*, 384 U.S. 737	21
Garner v. *United States*, No. 74-100, decided March 23, 1976	13
Glickstein v. *United States*, 222 U.S. 139	14, 15, 18
Hampton v. *United States*, No. 74-5822, decided April 27, 1976	22
Haynes v. *Washington*, 373 U.S. 503	21
La Rocca v. *United States*, 337 F. 2d 39	20
Lefkowitz v. *Turley*, 414 U.S. 70	13
Masinia v. *United States*, 296 F. 2d 871	20
Miranda v. *Arizona*, 384 U.S. 436	21, 22
Schneckloth v. *Bustamonte*, 412 U.S. 218	21
Sherman v. *United States*, 356 U.S. 369	22
Sorrells v. *United States*, 287 U.S. 435	22
Turner v. *Pennsylvania*, 338 U.S. 62	21
United States v. *Cross*, 170 F. Supp. 303	20
United States v. *Del Toro*, 513 F. 2d 656, certiorari denied, 423 U.S. 826	18
United States v. *Dowdy*, 479 F. 2d 213, certiorari denied, 414 U.S. 866	22
United States v. *Icardi*, 140 F. Supp. 383	20
United States v. *Irali*, 503 F. 2d 1295	20
United States v. *Knox*, 396 U.S. 77	10, 14, 15, 18
United States v. *Lazaros*, 480 F. 2d 174	20, 22
United States v. *Mandujano*, 496 F. 2d 1050, reversed and remanded, No. 74-754, May 19, 1976	*passim*
United States v. *Orta*, 253 F. 2d 312	16
United States v. *Rangel*, 496 F. 2d 1059	8
United States v. *Russell*, 411 U.S. 423	22
United States v. *Watson*, 423 U.S. 411	21

Cases—Continued

	Page
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	17-18

Constitution and statutes:

United States Constitution, Fifth Amendment:	7, 14
Due Process Clause	2, 8, 10, 11, 15-16, 17, 22
Self-Incrimination Clause	2, 10, 13, 14, 15, 16, 17, 22
18 U.S.C. 1511	3
18 U.S.C. 1623	2, 6
18 U.S.C. 1955	3

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-635

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not yet reported. The order of the district court (App. 15) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on September 23, 1974. On October 23, 1974, Mr. Justice Douglas extended the time

within which to file a petition for a writ of certiorari to and including November 22, 1974. The petition was filed on November 22, 1974, and was granted on June 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a "putative defendant" called as a grand jury witness is entitled to have her perjurious statements suppressed on the ground that she did not understand the government's warning concerning her "right to remain silent."

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 7, 1973, respondent Rose Wong testified before a grand jury in the Northern District of California. Her testimony was elicited in connection with a general investigation to discover violations of 18 U.S.C. 1955 (illegal gambling businesses) and 18 U.S.C. 1511 (obstruction of state and local enforcement). At the time of respondent's appearance before the grand jury, the government had evidence that she had paid bribes to certain local police officers, who had turned the money over to the Federal Bureau of Investigation. The government prosecutor sought her testimony in order to learn the names of other officers who might be receiving bribes, but who had not cooperated with the government (Tr. 96-97).[1]

Prior to testifying and after the grand jury foreman had administered the oath (App. 2), respondent was informed of the nature and purpose of the proceedings and was warned of her rights by the prosecutor (App. 2-4):

> Q. Mrs. Wong, my name is Robert B. Ward and this is Mr. Hinckeley. Both of us are attorneys for the Justice Department.
>
> This Grand Jury is investigating certain alleged violations of Federal Law, including the gambling laws, within the Chinatown area.
>
> You have been subpoenaed to testify here because the Grand Jury feels that you have infor-

[1] "Tr." refers to the transcript of the hearing in the district court on respondent's motion to dismiss the indictment.

mation which may be helpful in their investigation.

Prior to my asking certain questions, let me advise you of certain rights [to] which you are entitled as a witness here.

You, of course, need not answer any question which you feel may tend to incriminate you.

A. Uh huh.

Q. The Fifth Amendment of the United States Constitution gives you the right to refuse to answer any question which you feel might incriminate you.

Do you understand that, mam [*sic*]?

A. Yes.

Q. Further, if you do give an answer, that answer may be used against you in a subsequent criminal prosecution, if in fact the Government should decide to prosecute you for any crime. Any statements you make here may be used against you.

Do you understand that?

A. Yes.

Q. You also have the right to consult with an attorney prior to answering any question here today. Do you understand that?

A. Yes.

Q. Have you consulted with an attorney?

A. No.

Q. Please be advised that should the occasion arise in which you do not want to proceed without talking to an attorney, that you have the right to notify us, and we will stop the proceeding and you may consult with an attorney prior to continuing with the questioning.

Do you understand that, mam [*sic*]?

A. Yes.

Q. Further, if you cannot afford an attorney, that we would see that an attorney is afforded to represent you.

Do you understand that?

A. Yes.

In addition, the prosecutor carefully explained to respondent the meaning of perjury and the penalties to which she might be subjected if she perjured herself (App. 4):

> Q. Having sworn to tell the truth, Mrs. Wong, it is incumbent upon you to tell the truth, if you do answer any questions and should you knowingly give any false testimony, or false answers to any questions, you would be subject to prosecution for the crime of perjury under the Federal Laws.
>
> Do you understand that?
>
> A. Yes.
>
> Q. Do you know what perjury is?
>
> A. Not very well.
>
> Q. Well, in essence perjury means telling a lie under oath.
>
> Do you understand what that is?
>
> A. Yes.
>
> Q. Do you know the difference between lieing [*sic*] and telling the truth?
>
> A. Yes.
>
> Q. Under oath?
>
> A. Uh huh.
>
> THE FOREMAN: Mr. Ward, you might advise Mrs. Wong that the stenographer needs her answers.

MR. WARD: Q. Mrs. Wong, the Foreman points out that you must answer each question. You can't nod your head or mumble. She has to take down an answer.

Do you understand that?

A. Oh, I see that.

Q. She is writing down all the questions and answers.

A. I see.

Q. With respect to perjury, as we have discussed it, let me advise you that the Federal crime of perjury, before a Grand Jury, carries a penalty of five years imprisonment. That is a maximum penalty and/or $10,000 fine.

Following these warnings, the prosecutor questioned respondent regarding her knowledge of gambling activities at specific locations in Chinatown and of the identities of local police officers who frequented those locations (R. 49-69).[2] During the course of the examination, respondent was asked if she had given money or gifts to any police officers and if she had ever met with any police officers to discuss gambling activities. She denied that she had engaged in any such activities (App. 4-5).

On November 29, 1973, respondent was indicted in the United States District Court for the Northern District of California for perjury, in violation of 18 U.S.C. 1623, on the basis of those denials before the grand jury (App. 5-6). On January 22, 1974, respondent filed a motion to dismiss the indictment on

[2] "R." refers to the record on appeal in the Ninth Circuit.

the ground, *inter alia*, that the testimony on which the indictment was based had been obtained without effective prior warnings of her Fifth Amendment rights (App. 7-8). At an evidentiary hearing on the motion to dismiss, held on January 29, 1974, and February 8, 1974, respondent sought to show that she was only minimally competent in the use of the English language and that she had not understood the warnings administered by the prosecutor in the grand jury room (Tr. 73-87; R. 29-32). In response, the government offered affidavits from the grand jury foreman and from the stenographer who had recorded respondent's grand jury testimony, both of which stated that "[respondent] had no difficulty whatsoever in understanding the questions asked of her" (R. 71) and that "[s]he answered the questions clearly and without undue hesitation, speaking in the English language" (R. 72). In addition, the government attorney who had managed the grand jury investigation stated in his own affidavit that with other witnesses called to testify during the investigation he had used an interpreter and that he would similarly have used an interpreter with respondent "had [there] been even the slightest indication of a language problem" (R. 73).

At the conclusion of the hearing the district court orally ruled that respondent's grand jury testimony should be suppressed.[3] The court found that although

[3] Although respondent's motion initially was for dismissal of the indictment, it was subsequently treated by the court, at respondent's request, as a motion to suppress her grand jury testimony (App. 11).

respondent had been given "a full, complete and adequate warning" of her privilege against self-incrimination prior to testifying, her lack of proficiency in the English language prevented her from understanding the warning (App. 14). Although the district court issued no written findings of fact, it stated during the course of the hearing that respondent had fully comprehended both the prosecutor's explanation of the concept of perjury and her obligation to testify truthfully (App. 13, 14-15). The court said respondent also had understood the substantive questions asked of her and "[had given] the answers she wanted to give" (App. 12). In addition, the court noted that the prosecutor had done "just about everything * * * [he] could reasonably be expected to do" to inform respondent of her rights before the grand jury (App. 10; see also App. 14).

On the government's appeal, the court of appeals affirmed. Relying in large part upon the opinions of the Court of Appeals for the Fifth Circuit in *United States* v. *Mandujano*, 496 F. 2d 1050, reversed and remanded, No. 74-754, May 19, 1976, and *United States* v. *Rangel*, 496 F. 2d 1059, which it termed "the only precedents directly in point" (Pet. App. 4a, n. 3), the court of appeals reasoned that "[t]he perjurious answers were induced by an unfair procedure violative of the [Due Process Clause of the Fifth Amendment]" (Pet. App. 2a). The procedure the court found unfair was the practice of issuing grand jury subpoenas to individuals known by the government to be involved in the matter under investigation

and questioning those individuals concerning that involvement. The unfairness stemmed, according to the court "from the threat * * * pose[d] [by this practice] to the values protected by the privilege [against self-incrimination]" (Pet. App. 2a). To remedy the perceived unfairness, the court held that questioning of grand jury witnesses known by the government "to be virtually in the position of a defendant" must be "accompanied by warnings which in fact apprise the witness of the right to remain silent * * *" (Pet. App. 3a).

The court acknowledged that respondent in this case had received all the warnings to which she was entitled under the court's holding and stressed that it found no "bad faith" on the part of the government (Pet. App. 5a, n. 4). Indeed, the court found that "the government's attorney carefully informed appellee of her rights and believed she understood them" (*ibid.*). The court nevertheless held that the "unfairness" had not been remedied by the prosecutor's efforts, since respondent in fact had not understood the explanation of her rights (Pet. App. 5a).

SUMMARY OF ARGUMENT

1. All three opinions in *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, concur unreservedly in the proposition that, whether or not the prosecutor is obliged by the privilege against compelled self-incrimination to give some form of warnings to grand jury witnesses who are "putative" or "potential" defendants, such a witness may not com-

mit perjury and thereafter claim that the Constitution affords protection from prosecution for that crime. That conclusion was the outgrowth of a consistent line of decisions of this Court stretching back over 50 years.

There is no basis for reaching a different result in this case. The only arguable distinction in the facts of the two cases arises from the finding in this case that the respondent did not understand the advice of rights that she received prior to testifying before the grand jury. At most, however, that places her in the position of one who has received no warnings at all. But even if, *arguendo*, such a witness might be said to have been "compelled" to give testimony, the absence of warnings in no way compels the witness to answer falsely. Cases such as *Bryson* v. *United States*, 396 U.S. 64, and *United States* v. *Knox*, 396 U.S. 77, in which the defendants' false statements were the product of much more direct and palpable coercion, dispose of any argument that the Self-Incrimination Clause supports a different result in this case from that reached in *Mandujano*.

2. Nor is the result different when the case is analyzed in terms of the Due Process Clause. The practice of calling "potential defendants" before the grand jury ordinarily implicates only those interests with which the Self-Incrimination Clause is concerned; absent some extraordinary circumstance not here present, the Due Process Clause brings no significant additional constitutional policies to bear upon the question whether a "potential defendant" may

testify falsely without fear of subsequent prosecution. Thus, if the testimonial privilege is not violated by what happened in this case, talismanic invocation of the Due Process Clause does not justify affording a defendant relief. Indeed, all opinions in *Mandujano* were in agreement that the facts of that case presented no due process problem; the facts of the instant case are identical in all material respects. As indicated, the only difference in the two cases concerns the defendants' subjective understanding of the advice of rights given prior to questioning; whatever arguable relevance such a distinction may have to the self-incrimination analysis, it is wholly unrelated to the fairness of the governmental conduct involved, which is the touchstone of due process analysis.

ARGUMENT

A "Putative Defendant" Called As A Grand Jury Witness Is Not Entitled To Have Her Grand Jury Testimony Suppressed In A Perjury Prosecution On The Ground That She Did Not Understand The Government's Warning Concerning Her "Right To Remain Silent"

In our brief in *United States* v. *Mandujano*, No. 74-754, October Term, 1974, decided May 19, 1976, and in our brief this Term in *United States* v. *Washington*, No. 74-1106, we have discussed at some length the propriety of calling "potential defendants" before grand juries and the nature of the obligation, if any, to provide warnings to such individuals prior to questioning them before the grand jury.[4] These issues have been examined in light of

[4] Copies of the government's briefs in *Mandujano* and *Washington* are being furnished to respondent's counsel.

both the privilege against compelled self-incrimination and the government's obligation to afford due process of law, and we have argued on the basis of that examination that there is no valid constitutional objection to calling "potential defendants" before the grand jury and no constitutional duty on the prosecutor to warn such witnesses of their rights. Because *Mandujano* produced no opinion for a majority of the Court, those questions remain unsettled in non-perjury cases; it may be anticipated that they will, to some extent at least, be resolved in *Washington*.

We do not here reiterate our general arguments. To the extent the Court may find it necessary to consider these issues, we rely on the arguments being made contemporaneously in *Washington*. In our view, the broad issues of governmental responsibilities toward grand jury witnesses need not be reached in the instant case, because this case turns, as did *Mandujano*, on the fact that this is a perjury prosecution. Accordingly, we address here the question whether there is any reason, in light of either self-incrimination or due process considerations, why this Court should depart in this case from its unanimous holding in *Mandujano*.

A. *The privilege against compulsory self-incrimination does not require suppression of allegedly perjured grand jury testimony.*

While no opinion in *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, commanded a majority of this Court, all three opinions agreed that "[t]he Fifth Amendment privilege against compulsory self-incrimination provides no protection for the

commission of perjury" (Stewart, J., concurring; see plurality op. 11-13; Brennan, J., concurring op. 1). The Court recognized that "[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings," which "simply has no place whatever" "[i]n th[e] constitutional process of securing a witness' testimony * * *" (plurality op. 11). Effective restraints against the commission of perjury were seen as particularly necessary in the context of the grand jury, whose historic office has included the conduct of thoroughgoing investigations to ascertain whether crime has been committed (and by whom) and the provision of "a shield against arbitrary or oppressive action" by government prosecutors (plurality op. 6; see also *id.* at 6-13).

Mandujano is dispositive of any claim by respondent that her indictment for perjury is barred by the Fifth Amendment privilege against compulsory self-incrimination. The privilege entitles a witness to resist efforts to compel potentially incriminatory statements, and, if the witness's resistance is overcome, the compelled self-incriminating statements will be excluded from future substantive use by the prosecution. See *Garner* v. *United States*, No. 74-100, decided March 23, 1976, slip op. 5-6; *Lefkowitz* v. *Turley*, 414 U.S. 70, 78. But the witness may not avoid compulsion by committing perjury. See *Bryson* v. *United States*, 396 U.S. 64, 72. Indeed, in making the statements that are the subject of the indictment in this case, respondent has not been compelled to incriminate herself regarding a past crime; she has,

instead, committed a new crime for which the Fifth Amendment privilege affords no protection. See *United States* v. *Knox*, 396 U.S. 77, 82. "[T]he immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States*, 222 U.S. 139, 142.

This much is common ground for all the Justices who participated in *Mandujano*, and, we submit, it applies four-square to the facts of this case, which are virtually identical in all material respects. The only arguable distinction between the cases is that in *Mandujano* there was no finding that the defendant had not understood the advice of rights that he received. Here, respondent received the same advice of rights (indeed, a slightly broader one, since she was explicitly offered appointed counsel), but the court found that she had not understood it. This is a distinction without a difference for purposes of the self-incrimination analysis. At most, the district court's finding here would justify treating respondent's case as one in which no warnings at all had been administered, in contrast to Mandujano's case in which the court of appeals found that the warnings given had been insufficient. But it is plain, under the Self-Incrimination Clause, that a failure to warn would no more excuse perjury than administration of an insufficient warning.

Accepting for purposes of this analysis the view expressed in Mr. Justice Brennan's concurring opinion

in *Mandujano* that questioning of a "putative" defendant may be considered coercive in the absence of a knowing and intelligent waiver of the testimonial privilege, and that such a waiver depends upon an effective advice of rights, that view simply puts respondent in the position of one who has (in this somewhat special sense) been "forced" to testify. But respondent was not in any meaningful sense forced to testify falsely. In *Bryson*, the defendant was obligated to file a "non-Communist" affidavit with the National Labor Relations Board if he wished to retain his union office (see 396 U.S. at 67), and in *Knox*, the defendant faced criminal penalties unless he filed the wagering tax return in which he allegedly made false statements (*id.* at 81). The defendants in both cases surely were confronted with greater coercion than was respondent in the instant case, yet both were held accountable for the falsity of their statements. As Mr. Justice Harlan stated in *Knox* (396 U.S. at 82): "[W]hen Knox responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion."

B. *Prosecution for perjury under the circumstances of this case does not violate the Due Process Clause.*

Recognizing that, under the *Knox-Bryson-Glickstein* line of authority, suppression of false testimony cannot be justified by reference to the self-incrimination provision of the Fifth Amendment (Pet. App. 2a-3a), the court of appeals here, like the court of appeals in *Mandujano*, explicitly rested its holding on the Due

Process Clause (*id.* at 2a). And in *Mandujano*, Mr. Justice Brennan suggested that the only relevant inquiry in considering whether a "putative defendant" who commits perjury before a grand jury may be prosecuted is whether the "false answers were * * * induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute * * * a violation of the Due Process Clause of the Fifth Amendment" (concurring op. 1; see also plurality op. 5 (quoting from *United States* v. *Orta*, 253 F. 2d 312, 314 (C.A. 5)); Stewart, J., concurring).

Barring the presence of truly extraordinary facts, however, we have difficulty understanding how the due process inquiry can aid the analysis. The interests implicated by grand jury questioning of potential defendants, to the extent they reflect any constitutional values, appear to us to involve almost exclusively the policies of the Fifth Amendment's protection against compelled self-incrimination. When those policies are not offended, as they plainly are not here (see pp. 12-15, *supra*), there can ordinarily be no basis for relief on due process grounds.[5] Surely

[5] The court of appeals justified its reliance on the Due Process Clause in part as a means of further insulating the values protected by the privilege against self-incrimination (Pet. App. 2a, 3a-4a). But as we have explained (pp. 12-15, *supra*), and as this Court held in *Mandujano*, the testimonial privilege is not implicated when a witness is prosecuted for perjury. Indeed, the court of appeals in this case acknowledged that this was the case (Pet. App. 3a). The court of appeals' due process rationale thus must rest on some other constitutional value.

the vague and seemingly talismanic invocation of due process by the court of appeals here does not suffice to explain how the Due Process Clause could justify the result reached by the court when the Self-Incrimination Clause concededly does not. In any event, whatever the general validity of an independent due process analysis in cases such as this, what transpired here involved no improper government conduct, and certainly no misconduct so fundamentally unfair that respondent can properly be said to have been denied due process of law.

1. The court of appeals was critical of the government's practice of calling as grand jury witnesses individuals known or suspected by the government to have some involvement in the kind of criminal activity under investigation (see Pet. App. 4a-5a). But this practice is vitally important to the grand jury process. Such individuals are appropriate and often necessary sources of information. *United States* v. *Mandujano*, *supra*, plurality op. 8-9, 19, n. 9. In the instant case, for example, respondent's testimony could have been critically important to the grand jury in determining who, if anyone, was involved in illegal gambling and police bribery. Moreover, a witness who is a "potential defendant" may wish to confess his or her part in the offense (the Constitution reflects no policy against voluntary confessions), or may be able to exculpate himself or herself to the satisfaction of the grand jury. See *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2),

certiorari denied, 382 U.S. 955; *Mandujano*, *supra*, plurality op. 19, n. 9.

Thus, contrary to the court of appeals, we submit that there is nothing inherently unfair about normal grand jury questioning of individuals whom the grand jury or the prosecutor suspects of being involved in the criminal matter under investigation. As the court said in *United States* v. *Del Toro*, 513 F. 2d 656, 664 (C.A. 2), certiorari denied, 423 U.S. 826: "It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth." So long as the witness's will has not been overcome by threats, trickery or force, the questioning of a "putative defendant," even without the giving of warnings, accords with due process, and the witness's choice to commit perjury should not be attributed, in the due process inquiry, to any action the government took or failed to take.

The government's conduct in this case was materially the same as that which the Court in *Mandujano* found not to violate applicable due process standards.[6] In both cases, the witness was called to

---

[6] Thus, Mr. Justice Brennan observed in his concurring opinion that he was satisfied (on a record essentially the same as that in the instant case) that there were no "governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment" (slip op. 1). And Mr. Justice Stewart, also relying on the *Bryson-Knox-Glickstein* line of cases for the proposition that the impropriety of questioning is ordinarily no defense to a perjury charge, stated, in words fully applicable to this case,

testify before a grand jury investigating criminal activity of a kind with which he or she was known to have some involvement. Mandujano was subpoenaed to testify before the grand jury because of his known connection with heroin distribution activities (plurality op. 19); respondent was called because of her known attempts at bribery of police officers and the belief that she would possess information about police corruption in Chinatown (Tr. 97). In both cases, the questions to which allegedly perjurious answers were given focused upon the witnesses' participation in unlawful activities about which the prosecutor already possessed specific information. Moreover, before questioning the witness in each case, the prosecutor issued detailed warnings of the right not to answer incriminating questions and the right to consult with counsel before answering any question. He also explained the concept of perjury and the significance of the oath to testify truthfully. Finally, as in *Mandujano*, none of the substantive questions asked of respondent concerned

---

that he joined in reversal because "this is not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process" (concurring op.).

If anything, the government's position is somewhat stronger in the instant case because of the court of appeals' explicit recognition that there was no actual bad faith on the part of the government in its conduct of the grand jury proceedings (Pet. App. 5a, n. 4). The court of appeals in fact found that the government believed respondent understood her rights (*ibid.*).

matters outside the scope of the grand jury's legitimate investigative purposes. Compare *Brown* v. *United States*, 245 F. 2d 549, 555 (C.A. 8); *United States* v. *Cross*, 170 F. Supp. 303 (D. D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D. D.C.); *La Rocca* v. *United States*, 337 F. 2d 39, 43 (C.A. 8); *Masinia* v. *United States*, 296 F. 2d 871, 877 (C.A. 8). See *United States* v. *Irali*, 503 F. 2d 1295, 1301-1302 (C.A. 7); *United States* v. *Lazaros*, 480 F. 2d 174, 176-178 (C.A. 6).

2. The court of appeals, however, thought it necessary to suppress respondent's testimony, not because of any prosecutorial misconduct, but because the district court had found that, unbeknownst to the government, respondent's lack of proficiency in the English language prevented her from fully understanding the prosecutor's explanation of her rights. As we have argued above (pp. 12-15, *supra*), although this finding is the only arguably relevant factual distinction we can perceive between this case and *Mandujano*, this difference does not support a different result on a self-incrimination analysis. Since the difference is unrelated to the conduct of the government, but depends solely upon subjective factors peculiar to the witness, it follows *a fortiori* that it cannot justify a different result from *Mandujano* on due process grounds.

At bottom, the court of appeals' decision probably rests upon the assumption that respondent's inability to understand the prosecutor's warnings left her confronted by an unfair "dilemma" between lying and incriminating herself (Pet. App. 3a). But in determining that this was an "unfairness" violative of due process rights, the court of appeals entirely overlooked the long line of decisions of this Court prior to *Miranda* evaluating the voluntariness and admissibility of statements obtained by interrogation of persons suspected of criminal offenses. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503; *Davis* v. *North Carolina*, 384 U.S. 737; *Turner* v. *Pennsylvania*, 338 U.S. 62. See also the government's brief in *Mandujano*, pp. 51-52. As the Court explained in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226-227, in none of these cases

> did the court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated * * * they were not in and of themselves determinative.

See also *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976;[7] *United States* v. *Watson*, 423 U.S. 411, 424-425.

---

[7] In *Beckwith*, the Court refused to suppress statements made under non-compulsive circumstances, despite the fact that the person being interrogated was a "potential defendant" who was not fully warned of his rights. As *Beckwith* makes plain, the requirements of a knowing waiver imposed

Here, where respondent resolved her "dilemma" by lying to the grand jury, the Due Process Clause similarly does not require suppression of her testimony (which amounts to immunization from prosecution) solely on the ground she may not have known of her right to remain silent.[8] As we explained in our brief in *Mandujano* (pp. 16-19, 26-27, 35-36), suppression of perjurious testimony on the ground the government did not adequately inform a "putative defendant" witness of his or her rights would gain little or no protection for constitutional values, at the expense of possibly great impairment of the grand jury system. Respondent here knew the meaning and consequences of her having taken the oath. She was constitutionally entitled to no more.

by the Court in *Miranda* v. *Arizona*, 384 U.S. 436, in the context of custodial interrogation, has no place in the non-custodial situation.

[8] Nor can the court's result be justified on an entrapment rationale, for a "putative defendant" who lies to a grand jury rather than incriminate himself cannot be considered to be "entrapped" into committing perjury, as the concept of entrapment has been articulated by this Court, even if his false testimony is not the product of a knowing and intelligent waiver of the Fifth Amendment testimonial privilege. See *United States* v. *Lazaros*, *supra*, 480 F.2d at 178-179; *United States* v. *Dowdy*, 479 F.2d 213, 230 (C.A. 4), certiorari denied, 414 U.S. 866. The government does not implant the design to commit perjury in the mind of such a witness. See *United States* v. *Russell*, 411 U.S. 423, 436; *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976. Nor does the government thwart whatever predisposition the witness may have to tell the truth. See *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369. As the plurality said in *Mandujano* (slip op. 19) with respect to similar facts, "nothing remotely akin to 'entrapment' * * * is suggested by what occurred here."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ANDREW L. FREY,
Deputy Solicitor General.

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General.

MICHAEL E. MOORE,
Attorney.

AUGUST 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 217825 292

Supreme Court, U. S.
FILED
OCT 15 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-635

UNITED STATES OF AMERICA, *Petitioner,*

VS.

ROSE WONG, *Respondent.*

BRIEF FOR RESPONDENT

ALLAN BROTSKY,
1256 Market Street,
San Francisco, California 94102,
Telephone: (415) 864-3131,
Attorney for Respondent.

PERNAU-WALSH PRINTING CO. • 562 MISSION STREET • SAN FRANCISCO, CA 94105

Subject Index

Page

Question presented 1

Statement 1

Summary of argument 4

Argument 7

I

A "putative" defendant subpoenaed to testify before a federal grand jury must be effectively informed of his privilege against compulsory self-incrimination or he may thereafter have any testimony he gives suppressed as a violation of his privilege 7

A. A "putative" defendant subpoenaed by a grand jury must be effectively advised by the prosecutor of his privilege against compulsory self-incrimination 7

B. The failure to advise a "putative" defendant of his privilege against self-incrimination requires suppression of his grand jury testimony for use in any prosecution which follows his appearance, including one for perjury 11

II

A failure effectively to inform a grand jury "putative" defendant witness of his privilege against self-incrimination is a violation of due process which compels the suppression of his testimony 15

Conclusion 17

Table of Authorities Cited

Cases	Pages
Beckwith v. U.S., No. 74-1243, 44 USLW 4499	10
Bryson v. U.S., 396 U.S. 64	12, 13
Counselman v. Hitchcock, 142 U.S. 547	9
Galvan v. Press, 347 U.S. 522 (1954)	15
Garner v. U.S. No. 74-100, 44 USLW 4323	8, 9, 11
Garrity v. New Jersey, 385 U.S. 493	13
Glickstein v. U.S., 222 U.S. 139	12, 13
In re Murchison, 349 U.S. 133 (1955)	17
Lisenba v. California, 314 U.S. 219	8
McNabb v. U.S., 318 U.S. 332 (1943)	11
Mackey v. U.S., 401 U.S. 667	12, 13
Michigan v. Mosley, 44 USLW 4015	10
Rochin v. California, 342 U.S. 165 (1952)	15
Smith v. Katzenbach, 351 F.2d 810 (D.Col. 1965)	11
Tehan v. Shott, 382 U.S. 406 (1966)	11
U.S. v. Blue, 384 U.S. 251	13
U.S. v. Knox, 396 U.S. 77	12, 14
U.S. v. Mandujano, 44 USLW 4629	4, 5, 7, 8, 14, 15, 16
U.S. v. Monia, 317 U.S. 424 (1943)	13
U.S. v. Washington, No. 74-1106 (1976)	7
Wong Sun v. U.S., 371 U.S. 471 (1963)	11

Constitutions	
Fifth Amendment	passim

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-635

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ROSE WONG, *Respondent.*

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether a "putative" defendant called as a grand jury witness is entitled to have her testimony suppressed in a perjury prosecution on the ground that she was not effectively informed of her privilege against self-incrimination.

STATEMENT

Rose Wong, a native of China, completed eight grades of elementary education at Commodore Stockton School in San Francisco. She married a non-English speaking husband, and conversed at home

with him in Chinese, as she did, with few exceptions, with their San Francisco born daughter (Tr. 73-75).[1]

She was subpoenaed to appear before a grand jury in the Northern District of California investigating illegal gambling businesses and the obstruction of state and local law enforcement. Before her appearance, the same grand jury had heard testimony from two San Francisco police officers acting as undercover agents for the Federal Bureau of Investigation that Mrs. Wong had paid them bribes in order that she might carry on a gambling establishment in Chinatown without police interference. (Tr. 92-93).

Mrs. Wong appeared without an attorney, and without having consulted one (App. 3). She was not questioned by the prosecutor about her need for an interpreter, and was instructed and testified without one. The questions she was asked before the grand jury dealt specifically with the alleged illegal activities on her part, and if answered affirmatively would clearly have incriminated her. She was subsequently indicted for perjury.

After her indictment, she moved to suppress her testimony before the grand jury on the ground that her limited comprehension of English had prevented her from understanding the prosecutor's attempted explanation of her privilege under the Fifth Amendment not to incriminate herself.

At the hearing on the motion before the district court, Mrs. Wong testified with the assistance of an

[1] "Tr." refers to the transcript of the hearing in the district court on Mrs. Wong's motion to suppress her grand jury testimony.

interpreter. The prosecutor testified as did Dr. William S.Y. Wang, Professor of Linguistics at the University of California, Director of its Phonology Laboratory and Editor of the Journal of Chinese Linguistics. Dr. Wang testified as an expert in evaluating the nature and extent of Mrs. Wong's understanding of and proficiency in the English language. It was his opinion that Mrs. Wong did not understand the prosecutor's explanation that the Fifth Amendment gave her the right to refuse to answer any question that might tend to incriminate her, even though she indicated that she did understand.[2]

Mrs. Wong, in addition to testifying that she did not understand the explanation of the prosecutor concerning the Fifth Amendment, made it clear that she thought that she had to answer each question.[3]

The district court granted the motion to suppress, and made the following findings which have not been challenged by the government:

[2] "THE COURT: In the previous question before that we have the equivalent of eleven lines and we have an answer, 'uh-huh' [The question referred to is the question which begins an App. 2 and concludes on App. 3].
THE WITNESS: Yes.
THE COURT: Now, do you draw any conclusion from that?
THE WITNESS: The conclusion that I would draw is that she feels that she had to respond, and not responding, she would lose face, and responding any which way would get her off the hook.
THE COURT: And is it this question of not responding and losing face that prompts you to conclude that she really didn't understand the Fifth Amendment question and yet answered 'Yes'?
THE WITNESS: That plus the other facts that we have been talking about" (Tr. 63).

[3] "Q. Did you feel that you had to answer each question?
A. That's what I thought" (Tr. 87).

1. Rose Wong was a "putative" defendant (App. 12-13);
2. She did not understand the prosecutor's explanation of the privilege against self-incrimination (App. 12).

On the government's appeal, the court of appeals affirmed the suppression order. It upheld the findings of the district court that the government's attempt to inform Mrs. Wong of her privilege against self-incrimination was not effective, because not understood (Pet. App. 5a). The case is here, then, in the same posture as it would be if Mrs. Wong had received no Fifth Amendment advice at all. The government makes its argument from that premises and we shall do the same.

SUMMARY OF ARGUMENT

A "putative" defendant subpoenaed to testify before a federal grand jury must be effectively informed of his privilege against self-incrimination under the Fifth Amendment, or he may thereafter have the testimony he gives suppressed as a violation both of his privilege against self-incrimination and his right to due process under the Fifth Amendment.

1. All three opinions in *U.S. v. Mandujano,* No. 74-754, decided May 19, 1976, agree that the testimony of a grand jury "putative" defendant witness who

has been effectively informed of his privilege against self-incrimination may not be suppressed in a perjury prosecution.

What *Mandujano* left open and what must be decided here is the effect of a failure effectively to advise a "putative" defendant grand jury witness of the privilege against self-incrimination.

A. Such effective advice must be given if the protection against compulsory self-incrimination is to remain meaningful before Federal grand juries. "Putative" defendants called before grand juries are in as great need to be informed of their privilege under the Fifth Amendment to refrain from answering incriminating questions as in-custody suspects are in need of complete *Miranda* warnings. The absence of such advice to grand jury "putative" defendant witnesses poses the same threat to the adversary system favored by the privilege as the absence of *Miranda* warnings to in-custody suspects. There is no distinction between a "putative" defendant who is in custody, and a "putative" defendant called before a grand jury, but with respect to compulsion to incriminate it is one of degree and not of character. The compulsion inherent in custodial interrogation requires extended warnings to preserve Fifth Amendment values; the compulsion inherent in a grand jury setting can be overcome by not less than effective advice concerning the privilege to decline to answer incriminatory questions.

B. When the prosecutor fails to give effective advice concerning the Fifth Amendment privilege, the

remedy available to the "putative" defendant witness must be suppression of his grand jury testimony in any prosecution which follows such testimony. Any other course would impermissibly dilute the privilege against self-incrimination. Specifically, this requires the suppression of such compelled testimony whether the indictment which follows it is for a substantive offense or for perjury. The doctrine that the Fifth Amendment does not constitute a license to commit perjury is not to the contrary.

2. A failure effectively to inform a grand jury "putative" defendant witness of his privilege against self-incrimination is also a violation of due process which compels the suppression of his grand jury testimony.

Where answers are induced by procedures which are inherently unfair, they are a product of a violation of due process, and must be suppressed. To call a "putative" defendant before the grand jury and fail effectively to inform him of his privilege to decline to answer incriminating questions, and then to ask him incriminating questions, is an inherently unfair procedure. It compels the witness either to incriminate himself or to perjure himself, when he could have declined to answer entirely had he been aware of the privilege. Thus, while it is the existence of the Fifth Amendment privilege which makes the dilemma confronting the uninformed witness unfair, it is the due process clause of the Fifth Amendment which prohibits subjecting the witness to such an unfair procedure.

ARGUMENT

I

A "PUTATIVE" DEFENDANT SUBPOENAED TO TESTIFY BEFORE A FEDERAL GRAND JURY MUST BE EFFECTIVELY INFORMED OF HIS PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION OR HE MAY THEREAFTER HAVE ANY TESTIMONY HE GIVES SUPPRESSED AS A VIOLATION OF HIS PRIVILEGE.

This case comes before this Court, in the light of the findings of the district court, as if Mrs. Wong had not been advised by the prosecutor of her privilege against self-incrimination under the Fifth Amendment. The initial inquiry that must be made, therefore, is whether such advice by the prosecutor is mandated by the Constitution or other requirements of law.

A. A "Putative" Defendant Subpoenaed by a Grand Jury Must be Effectively Advised by the Prosecutor of His Privilege Against Compulsory Self-Incrimination.

As was observed in the plurality opinion in *U.S. v. Mandujano,* No. 74-754, decided May 19, 1976: ". . . Federal prosecutors apparently make it a practice to inform a witness of the privilege before questioning begins." 44 USLW 4635, f.n.7 "[I]t is common practice for government attorneys to advise grand jury witnesses who are suspected of involvement in the criminal activity under investigation of their privilege against self-incrimination . . ." Brief for the United States, p. 19, *U.S. v. Washington,* No. 74-1106, October Term, 1976.[4] Yet the government insists that

[4]Apparently, no such advice is commonly given to grand jury witnesses who are not "putative" defendants.

such advice is not required by the Fifth Amendment. By what warrant and for what reasons does the government give such advice? These questions remain unanswered in its analysis of the problem.

The simple truth is that a grand jury "putative" defendant witness confronted with questions the answers to which could incriminate him does not have a "free choice to admit, to deny, or to refuse to answer" *(Lisenba v. California,* 314 U.S. 219. 241), unless he is aware of his privilege against self-incrimination and can claim it. "Absent a claim of the privilege, the duty to give testimony remains absolute" *(U.S. v. Mandujano,* 44 USLW, at 4633). It is in this sense that a grand jury interrogation of a "putative" defendant approximates the inherent coerciveness of custodial interrogation by the police, despite the marked other distinctions between the two processes. The insights expressed in *Garner v. U.S.* No. 74-100, 44 USLW 4323, concerning the need for *Miranda* warnings in custodial interrogations make manifest the need for advice concerning the privilege to a "putative" defendant called by a grand jury. "It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent. . . . At the same time, the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought. Thus, any pressures inherent in custodial interrogations are compulsions to incriminate, not merely compulsions to make unprivileged disclosures. Because of the danger that custodial interrogations posed to the adversary system favored by the privilege, the Court in *Miranda* was impelled to adopt the extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege," 44 USLW, at 4326.

When Rose Wong was confronted in the grand jury with questions concerning whether she had bribed police officers, she had no ability to freely choose to remain silent. She could do so only if she claimed her privilege against self-incrimination, a privilege of which she was unaware.[5] When she was asked the questions, the government prosecutor was acutely aware of the potentially incriminatory nature of the disclosures sought. Without advice to her of her right to claim the privilege, her questioning became inquisitorial, and made a mockery of the adversary system favored by the privilege.

The government urges upon this Court a view of the Fifth Amendment which is simplistic, unrealistic, and unwise. Unless the setting is one in which the full panoply of *Miranda* warnings are required, says the government, then none need be given. Yet all that is sought here is a Constitutional requirement that squares the availability of the privilege to a witness before a grand jury *(Counselman v. Hitchcock,* 142 U.S. 547) with the circumstances when it is most needed to preserve our adversary system, namely when a witness that the prosecutor is making a case

[5]She testified at the suppression hearing that she thought that she had to answer every question (Tr. 87).

against is asked potentially incriminating questions. Holding that the Constitution requires that such a witness be advised of his privilege before testifying will interfere not at all with the grand jury's functioning, nor with the ability of those potential defendants who want to implicate themselves to do so. It will make the privilege a reality to the untutored and the ignorant, as well as to those who are adequately counseled. And it will require no more than the government already is doing.

Finally, it will formalize the distinction between those situations requiring *Miranda* and those merely requiring advice concerning the Fifth Amendment privilege, a distinction which was implicit in this Court's holding in *Beckwith v. U.S.*, No. 74-1243, 44 USLW 4499.[6] The mechanism for the protection of constitutional rights must be fashioned by the setting in which they are threatened. *Michigan v. Mosley*, 44 USLW 4015, 4016. When the setting is as pervasively coercive as custodial interrogation, the full array of warnings mandated by *Miranda* is required. When the threat is limited to a specific practice of prosecutors which improperly deprives "putative" defendants of choice unless they are informed of their privilege against self-incrimination, then the simple remedy is to advise them of the privilege before they are interrogated. Such advice further protects Fifth

[6]In *Beckwith*, the holding was that statements made in a non-custodial interrogation by Internal Revenue Service agents were admissible despite the absence of *Miranda* warnings, but the defendant had been effectively advised of his privilege against self-incrimination. Mr. Justice Marshall concurred in the judgment.

Amendment values by preventing self-incriminating disclosures through ignorance.[7]

For the foregoing reasons, the Court should rule that Fifth Amendment privilege against self-incrimination requires that a "putative" defendant grand jury witness be effectively advised of its existence before he is interrogated.[8]

B. The failure to advise a "Putative" Defendant of His Privilege Against Self-Incrimination Requires Suppression of His Grand Jury Testimony for use in any Prosecution which Follows His Appearance, Including One for Perjury.

The ordinary and usual remedy for correcting Constitutional violations which have resulted in improperly compelled testimony, statements or other evidence is to suppress their use to prove the offense in any subsequent prosecutions.[9] *Smith v. Katzenbach*, 351 F. 2d 810, 815 (D. Col. 1965).

This ordinary and usual remedy is not available to Rose Wong in this case, argues the government. Allegedly perjurious testimony, as opposed to self-incriminating testimony, may not be suppressed because the Fifth Amendment privilege against self-

[7]"In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice. See *Tehan v. Shott*, 382 U.S. 406, 415 (1966). That system is undermined when a government deliberately seeks to avoid the burdens of independent investigations by compelling self-incriminating disclosures." *Garner v. U.S.*, 44 USLW, at 4326.

[8]Of course, this Court could prescribe such a requirement in the exercise of its "supervisory powers". *McNabb v. U.S.*, 318 U.S. 332 (1943).

[9]An alternative remedy is to exclude their receipt in evidence to prove the offense during the trial. *E.g., Wong Sun v. U.S.*, 371 U.S. 471 (1963).

incrimination provides no protection for the commission of perjury. We shall show that this principle, based on what the government calls the *Knox-Bryson-Glickstein* line of authority[10] has no application to this case, and that the vindication of the Fifth Amendment privilege which was violated in this case requires the suppression of Rose Wong's testimony.

Two principles emerge from the *Knox-Bryson-Glickstein* line of decisions. The first is that one who has committed perjury may not challenge the right of the government to *ask* the question which was answered perjuriously. *Bryson v. U.S.,* 396 U.S. 64.

The other is that even though the Fifth Amendment would have permitted an informed witness to decline to answer the question in the first instance, it does not shield one who nevertheless answers from a prosecution for perjury. *U.S. v. Knox,* 396 U.S. 77; *Mackey v. U.S.,* 401 U.S. 667.

Glickstein v. U.S., 222 U.S. 139, stood for neither proposition[11] but enunciated the famous dictum that the Fifth Amendment does not endow the person who testifies with a license to commit perjury.

All of these cases dealt with a witness or defendant who was fully aware of his privilege against self-incrimination. None of them, or others relying on their authority, dealt with the precise situation we have here, namely, an answer which is the product of

[10] *U.S. v. Knox,* 396 U.S. 77; *Bryson v. U.S.,* 396 U.S. 64; *Glickstein v. U.S.,* 222 U.S. 139.

[11] *Glickstein* held that a grant of immunity in the Bankruptcy Act did not include immunity from prosecution for perjury.

ignorance of the Fifth Amendment privilege. Had Rose Wong known of her privilege against self-incrimination when she was before the grand jury can there be any doubt that she would have remained silent under a claim of privilege and that the answers which are the subject of her indictment for perjury would never have been given?

There is a vital distinction between a witness with knowledge of the privilege and one ignorant thereof. When the former answers questions to which the privilege is applicable, he does so voluntarily.[12] When the latter does so, his answers are involuntary, i.e., without the freedom to decline to answer. In this sense, any testimony of an ignorant witness which could have been withheld by the privilege is "compelled" in violation of the Fifth Amendment.

This brings us to the critical juncture. Where the involuntary answer is self-incriminatory and is followed by an indictment for a substantive offense, it clearly is admissible or may be suppressed. *Garrity v. New Jersey,* 385 U.S. 493; *U.S. v. Blue,* 384 U.S. 251. According to the government, where the compelled answer leads to an indictment for perjury, it should not be suppressed, according to the teaching of decided cases.

We have demonstrated that the *Knox-Bryson-Glickstein* line of authority dealt with and hence

[12] "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *U.S. v. Monia,* 317 U.S. 424, 427 (1943).

applies only to voluntary answers, and not involuntary ones induced by ignorance. The question in the present context has, to our knowledge, never been decided by this Court. Unlike *Mandujano,* who "was free at every stage to interpose his constitutional privilege against self-incrimination" (44 USLW at 4635-4636) because he was aware of it, Rose Wong could not do so because she was ignorant thereof.

It is submitted that the testimony of Rose Wong which is the subject of her indictment should be suppressed because it was not a product of free choice on her part, and the vindication of the Constitutional privilege commands no less. The rule we seek is a narrow one. Only that testimony should be suppressed which could have been avoided by the claim of privilege. Only the testimony of the "putative" defendant witness ignorant of his privilege should be suppressed.

It is true that "[i]n this constitutional process of securing a witness' testimony, perjury simply has no place whatever." (*U.S. v. Mandujano,* 44 USLW 4629 at 4633) But if the process itself violates the Constitution, should not the Constitution prevail over the possibility that the perjury may not be punished. And the recognition that perjury itself must be willful *(U.S. v. Knox,* 396 U.S. 77, 83) makes it evident that under the narrow circumstances present here the suppression of testimony claimed to be perjurious would not denigrate the sanctity of the oath. An involuntary answer secured by a violation of the Constitution even if the answer is untrue is not "an

obvious and flagrant affront to the basic concepts of judicial proceedings." *U.S. v. Mandujano,* 44 USLW, at 4633.

For these reasons, the rulings below suppressing the grand jury testimony must be upheld, even though the indictment was for perjury. Suppressing the testimony of Rose Wong upon which her indictment was based resulted simply in restoring the record before the grand jury to the condition that would have obtained had she been aware of her rights.

II

A FAILURE EFFECTIVELY TO INFORM A GRAND JURY "PUTATIVE" DEFENDANT WITNESS OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION IS A VIOLATION OF DUE PROCESS WHICH COMPELS THE SUPPRESSION OF HIS TESTIMONY.

The court of appeals below found that "the procedure employed by the government was fraught with the danger, if indeed not intended, of placing appellee in the position of either perjuring or incriminating herself." This predicament violates "the sense of fair play—which is the essence of due process." *Galvan v. Press,* 347 U.S. 522, 530 (1954).

The particular facts of this case fill out the "vague contours" of due process. *Rochin v. California,* 342 U.S. 165, 170 (1952).

Mrs. Wong was not merely a witness called before a grand jury seeking information. That grand jury had, before she appeared, already heard testimony

that Mrs. Wong had offered bribes. The district court said, "How can you get a better defendant target than Mrs. Wong? She's ideally a defendant target. And she was, and she was brought in. And I must conclude that was the reason she was brought in" (App. 14).

Next, the district court found she did not understand the "questions related to constitutional rights which she would appear to be entitled to understand." (App. 12). Thus, unlike *Mandujano* the warnings volunteered by the prosecutor were not sufficient to inform her of her rights. 44 USLW 4634. And unlike Mr. Mandujano Mrs. Wong was never "free at [any] stage to interpose [her] constitutional privilege against self incrimination." 44 USLW 4635-4636.

In the posture of this case Mrs. Wong had no choice. Either her answers would incriminate her, or they would subject her to a perjury prosecution as being inconsistent with what the grand jury had already heard. This is an example "of the very evils sought to be prevented by the enshrinement of the Fifth Amendment privilege in the Constitution." Brennan, J., in *U.S. v. Mandujano,* 44 USLW at 3640. Failure to effectively advise Mrs. Wong of her privilege against self-incrimination was a violation of due process.

Nor should the legitimate investigatory function of the grand jury obscure the real nature of Mrs. Wong's situation. "We cannot ignore the obvious fact that while a few witnesses placed in such a position might honestly wish to confess, in the great majority of

cases asking incriminating questions of a putative defendant, were the witness fully informed of his rights, would be an idle task, as the witness would remain silent. The utility of the procedure to the government, and its inherent unfairness and danger, lies in the wholly predictable fact that the witness will be ignorant of or not understand the right to remain silent and be compelled by answering to subject himself to criminal liability" (Court of Appeals).

"[O]ur system of law has always endeavored to prevent even the probability of unfairness" *In re Murchison,* 349 U.S. 133, 136 (1955). For Mrs. Wong that probability became a certainty.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below be affirmed.

Dated, October 11, 1976.

ALLAN BROTSKY,
Attorney for Respondent.